

91-484

Case No.

Supreme Court, U.S.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MICHIGAN ATTORNEY GRIEVANCE COMMISSION

Petitioner,

vs.

Doe #1

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Court of Appeals No. 90-2219

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QUESTIONS PRESENTED

- I. DID THE SIXTH CIRCUIT COURT OF APPEALS IMPROPERLY INTERPRET FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)(3)(C)(i) TO PRECLUDE ACCESS OF FEDERAL GRAND JURY MATERIALS FOR USE BY THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION IN INVESTIGATING ATTORNEY MISCONDUCT?
- II. DID THE SIXTH CIRCUIT COURT OF APPEALS ERR IN FINDING THAT DISCLOSURE OF GRAND JURY MATERIALS TO THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION WAS NOT PRELIMINARY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING?
- III. DID THE UNITED STATES SUPREME COURT, IN ADOPTING RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, INTEND FOR THE FEDERAL COURTS TO IMPOSE A RIGID AND INFLEXIBLE STANDARD WHEN CONSIDERING A REQUEST FOR DISCLOSURE OF GRAND JURY EVIDENCE SUCH AS THAT PRESENTED BY THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION?
- IV. WHETHER THE SECRECY PROVISIONS OF RULE 6(e) ARE INCONSISTENT WITH THE UNITED STATES ATTORNEY'S ETHICAL OBLIGATION TO REPORT ATTORNEY MISCONDUCT WHICH WOULD OTHERWISE GO UNDETECTED?



— V. WHETHER THE SIXTH CIRCUIT COURT
OF APPEALS FAILED TO APPLY
STANDARDS ESTABLISHED BY THE
UNITED STATES SUPREME COURT
FORMULATED TO DETERMINE WHETHER
A PARTICULARIZED NEED WAS
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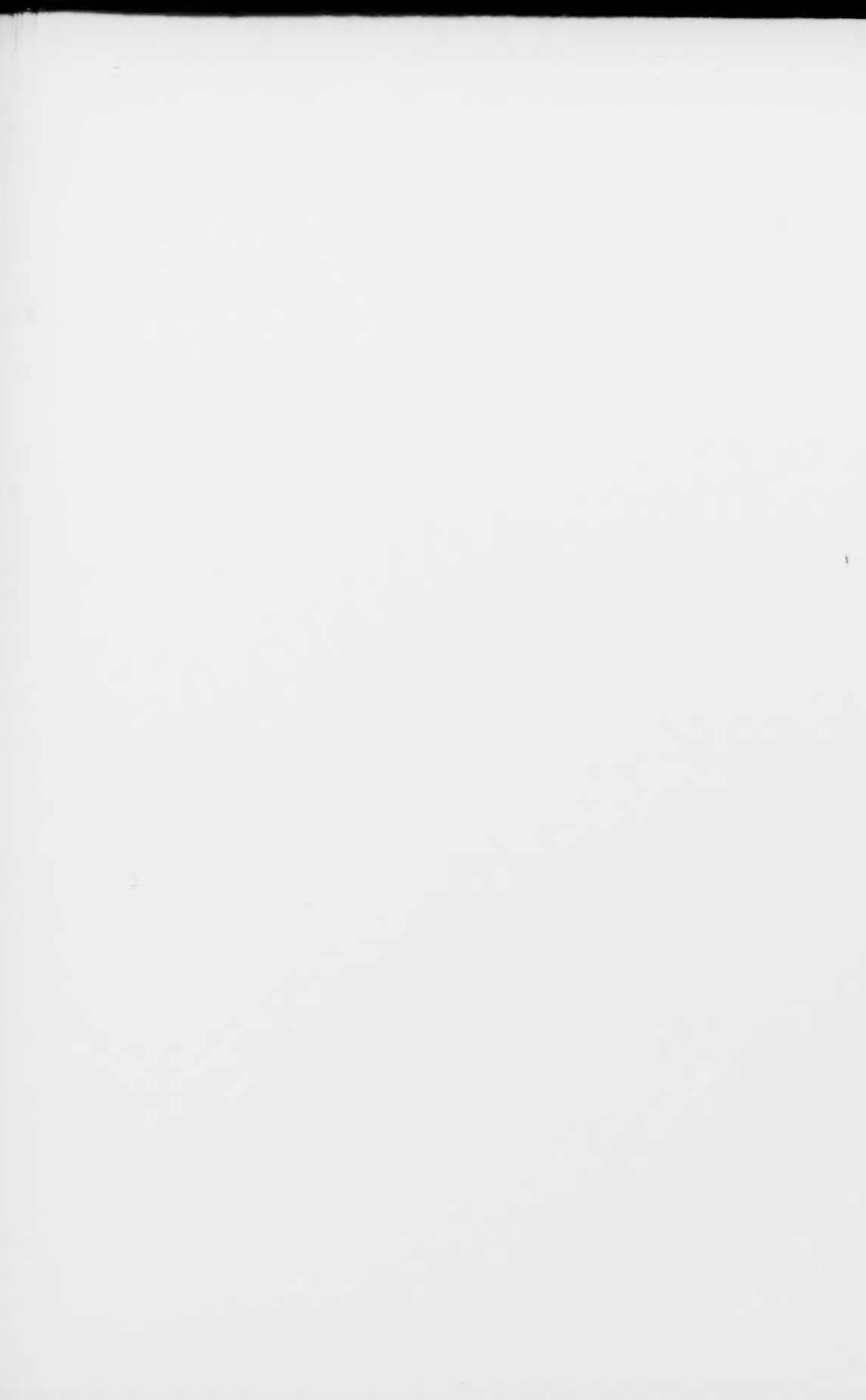


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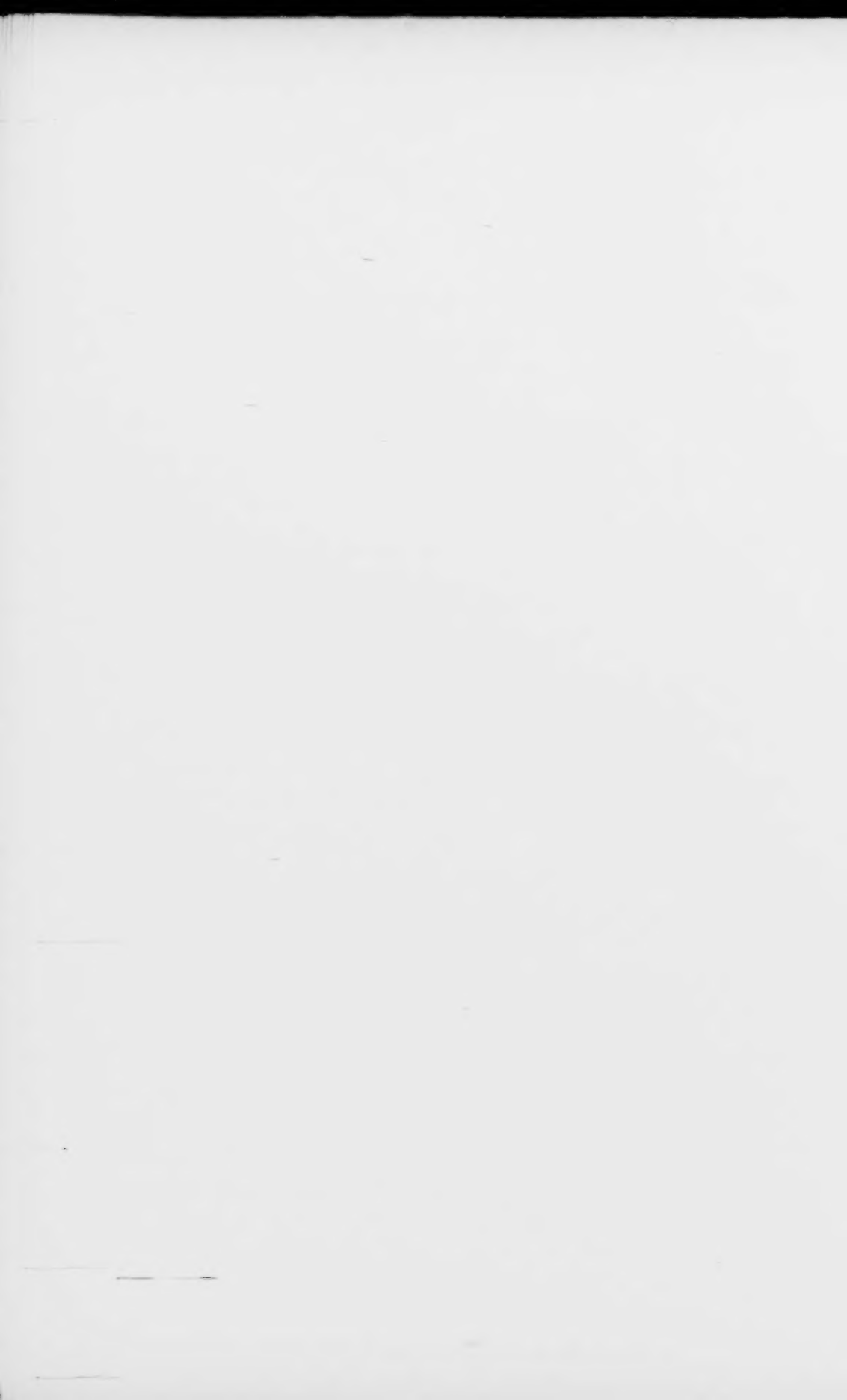
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Order Granting Doe's Motion To Stay Order Granting Disclosure of Grand Jury Materials, No. 90-1394 (D.C., E.D., Mich., filed November 7, 1990) (under seal of the court).

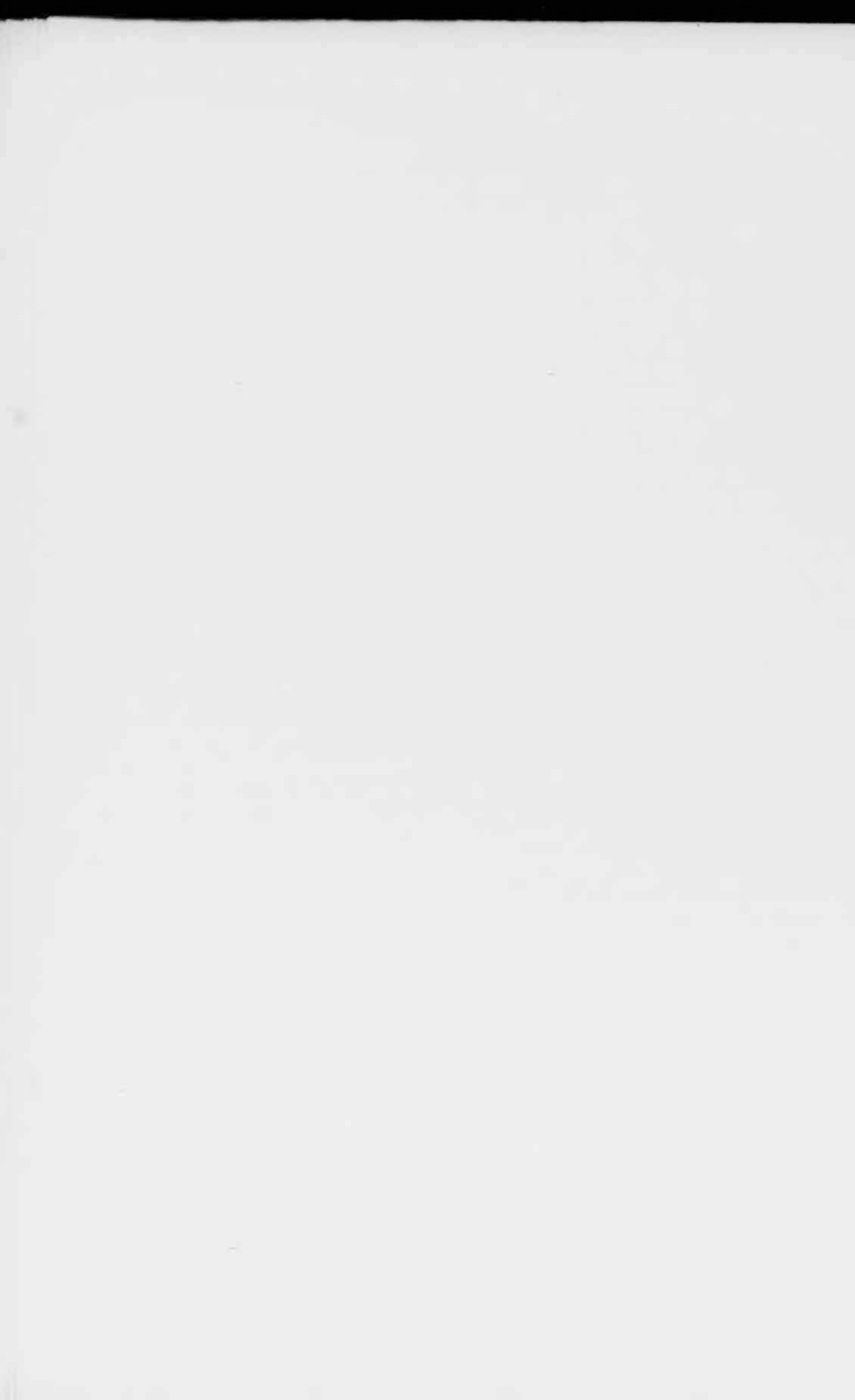
Doe v. Attorney Grievance Commission, No. 90-2219 published opinion, (6th Cir., filed April 26, 1991).

Judgment Reversing District Court's Order and Remanding Case For Further Action, No. 90-2219, (6th Cir., filed April 26, 1991, issued as mandate July 1, 1991).

Order Denying July 1, 1991 Petition For Rehearing, No. 90-2219 (6th Cir., filed June 20, 1991).

Order Granting Immediate Consideration and Denying Motion For Superintending Control, No. 91391, (Mich. S.Ct., filed April 25, 1991).

*The full text of the above opinions and orders which are not under seal of a court are set forth in the Petitioner's Appendix. The sealed documents referred to above and in this petition are being lodged by Petitioner, under seal, with the Clerk of this Court.



STATEMENT OF JURISDICTION

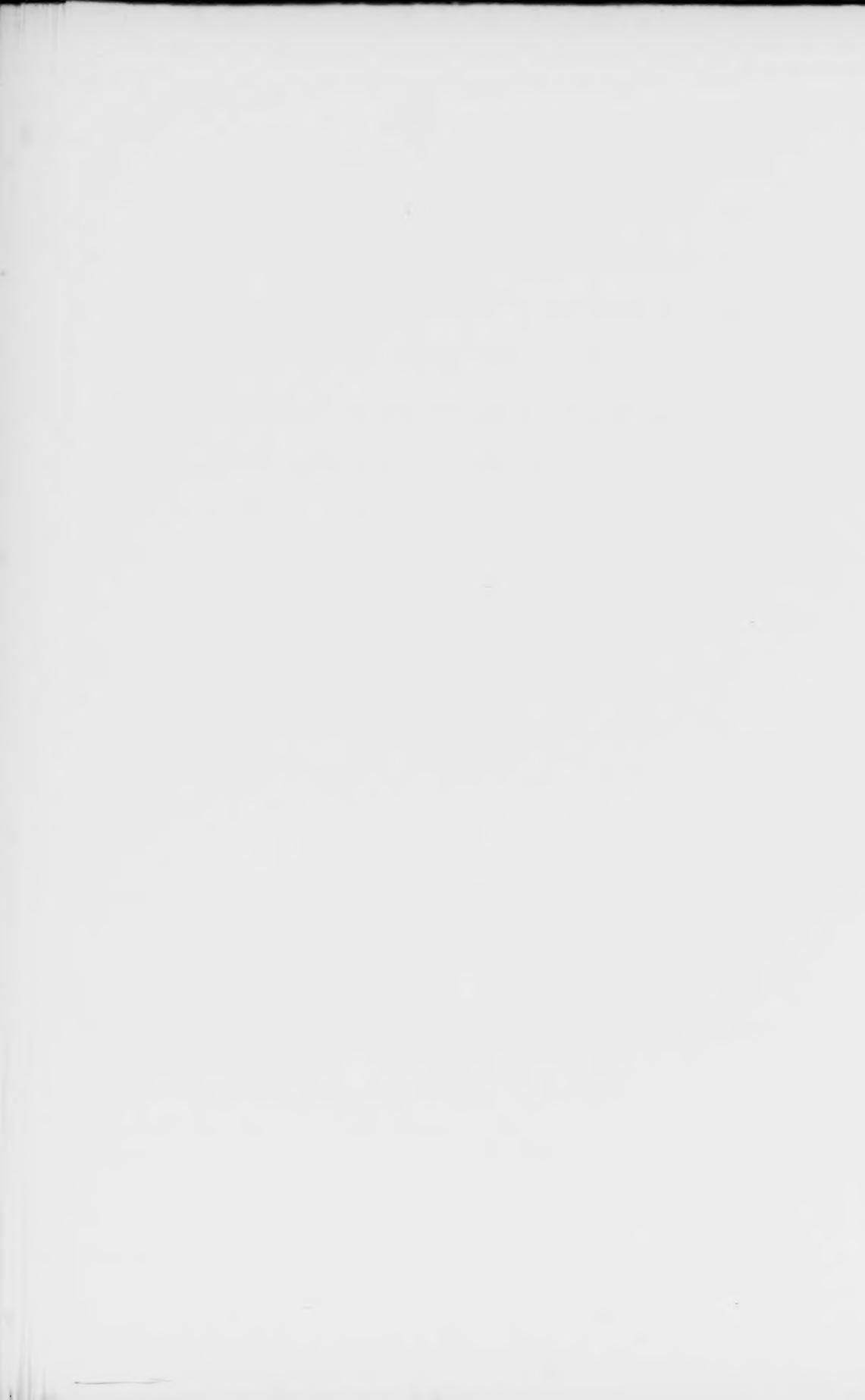
The judgment of the Sixth Circuit Court of Appeals was filed on April 26, 1991, and issued as a mandate on July 1, 1991. (App. p. 45) The Order Denying the Attorney Grievance Commission's Petition For Rehearing was entered on June 20, 1991. (App. p. 49) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The following provisions and rules are involved in this case:

Fed. R. Crim Pro. 6(e).
Mich. Ct. Rules 7.301, 7.304,
9.103, 9.104, 9.105, 9.106,
9.107, 9.108, 9.109, 9.100,
9.115, 9.122, 9.126, 9.127,
9.131.
Mich. Rules of Prof. Resp. 8.3.

The text of the above citations are set forth in the Appendix.



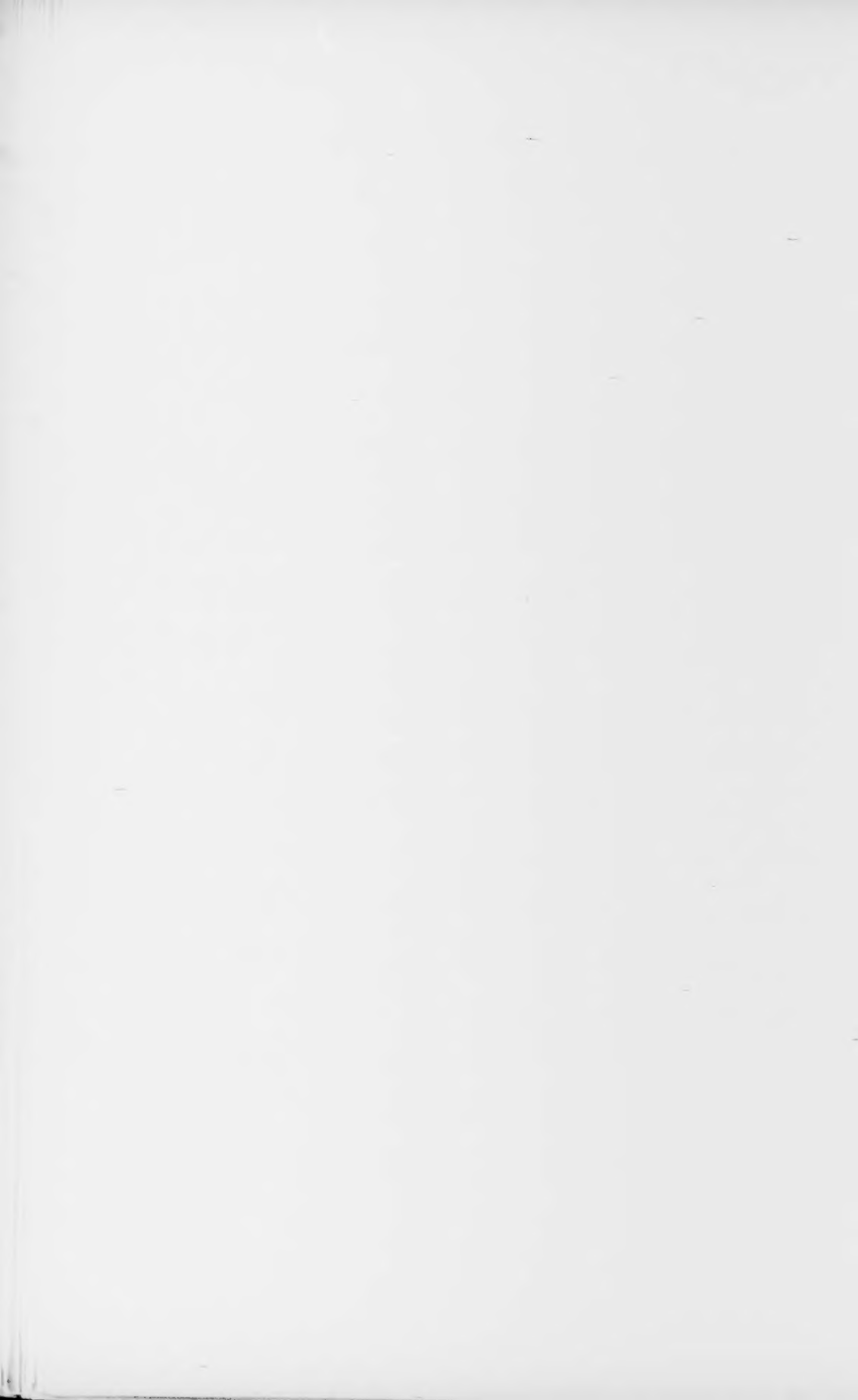
STATEMENT OF THE CASE

The Michigan Attorney Grievance Commission ("hereafter Commission") received information that federal authorities in the Eastern District of Michigan had commenced a criminal investigation into charges that one or more Michigan attorneys provided items of value to a Michigan Court of Appeals judge in exchange for favorable consideration of matters pending in the judge's court. The Commission's information indicated that a federal grand jury was impaneled and certain evidence was compiled in connection with this matter.

On September 11, 1990 the Commission filed a Motion Seeking Disclosure of Evidence Compiled in the Course of Grand Jury Investigation No. 89-4-72 and a Supporting Memorandum of Law. (Motion Seeking Disclosure of Evidence Compiled in



the Grand Jury Investigation Concerning Attorneys No. 90-1394, D.C., E.D. Mich., filed 9-11-90). (Lodged under seal with clerk of this Court). The jurisdiction of the district court was invoked under Federal Rule of Criminal Procedure 6(e)(3)(C)(i), which requires that a petition for disclosure of grand jury evidence be filed in the district court where the grand jury convened. See also, 28 U.S.C.A. 1331. Doe #1, one of the subjects of the grand jury and Attorney Grievance Commission investigations, filed an answer objecting to the Commission's Motion Seeking Disclosure. (Answer In Opposition to Motion, No. 90-1394, D.C., E.D. Mich., filed September 28, 1990). (Lodged under seal with the clerk of this Court). On October 2, 1990, the United States of America, through the United States Attorney, filed a response to the



Commission's Motion Seeking Disclosure of Grand Jury Evidence. In their response, the attorneys representing the government acknowledged that the Commission's need for the grand jury materials was "great" and that the need for disclosure was "greater than the need for absolute secrecy". (Govt.'s Response to Motion for Disclosure, No. 90-1394, D.C., E.D. Mich., filed October 2, 1990). (Lodged under seal with the clerk of this Court).

On October 26, 1990, the Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, issued a "Memorandum Opinion and Order", concerning the Commission's Request for Disclosure. In his written opinion, Judge Zatkoff stated that "this Court finds that the need for disclosure in this instance outweighs the need for continued secrecy" and granted the Commission's request for

disclosure of the grand jury materials. (Memorandum Opinion and Order, No. 90-1394, D.C., E.D. Mich., filed October 26, 1990). (Lodged under seal with the clerk of this Court). In the same "Memorandum Opinion and Order", the district court also granted a request filed by the Michigan Judicial Tenure Commission regarding the disclosure of grand jury materials relating to a Michigan judge.

Doe #1 then appealed the district court's order to the Sixth Circuit Court of Appeals. On April 26, 1991, the Court of Appeals, in a published Opinion, reversed the district court decision, finding that the district court erred in concluding that disclosure to the Commission was "preliminarily to or in connection with a judicial proceeding" and that the Commission had not demonstrated a particularized need for the evidence



requested. Doe v. Attorney Grievance Commission, No. 90-2219, (6th Cir. filed 04/26/91). (App. p. 1)

On or about May 9, 1991, the Commission filed a Petition For Rehearing With Suggestion For Rehearing En Banc claiming that the Sixth Circuit panel erred in finding that the attorney discipline mechanism employed by the State of Michigan does not constitute a judicial proceeding within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(C)(i). The Commission argued that the panel's decision was replete with error in its description of the composition and procedures of the Michigan attorney disciplinary system. Further, the Commission contended that the Sixth Circuit Court failed to properly apply United States Supreme Court standards in determining whether a particularized need was demonstrated. On June 20, 1991,

the original panel of the Court of Appeals denied the Commission's petition for rehearing. (Order, June 20, 1991). (App. p. 49)

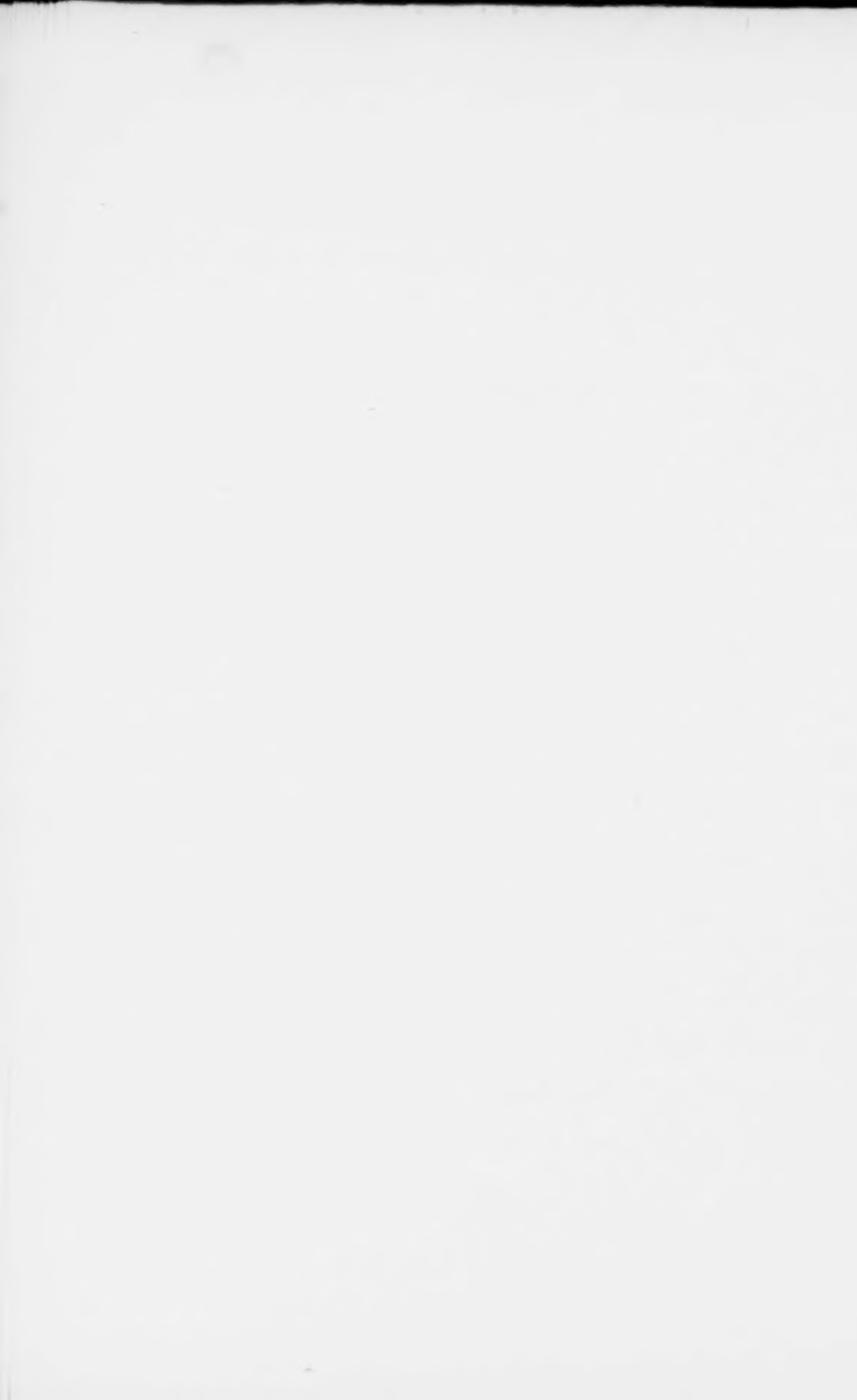
ARGUMENT

I.

THE SIXTH CIRCUIT COURT OF APPEALS IMPROPERLY INTERPRETED FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)(3)(C)(i) TO PRECLUDE ACCESS TO FEDERAL GRAND JURY MATERIALS FOR USE BY THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION IN INVESTIGATING ATTORNEY MISCONDUCT.

A. The Sixth Circuit Court Of Appeals Erred In Finding That Disclosure Of Grand Jury Materials To the Michigan Attorney Grievance Commission Was Not Preliminary To Or In Connection With A Judicial Proceeding.

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of "matters occurring before the Grand Jury." An exception is provided, however, in Rule 6(e)(3)(C)(i). Under this



- exception, disclosure of grand jury materials is allowed where (1) disclosure is sought preliminarily to or in connection with a judicial proceeding, and (2) there is a particularized need for the materials being sought. Douglas Oil Co. v. Petrol Stops, Northwest, 441 U.S. 211, 99 S.Ct. 1667 (1979). A district court's determination to release grand jury transcripts under Rule 6(e) may not be overturned unless there is a showing of a clear abuse of discretion. Douglas Oil Co. v. Petrol Stops, Northwest, supra; In Re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982); Petrol Stops Northwest v. Continental Oil, 647 F.2d 1005, 1008 (9th Cir.) cert. denied, 454 U.S. 1098, 102 S.Ct. 672 (1981). It is not the facts as presented by the moving party, but instead the trial judge's exercise of discretion that must be examined upon

review. State of Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir. 1977).

The phrase "preliminarily to a judicial proceeding" has been broadly interpreted. The most frequently cited definition of "judicial proceeding" as used in Rule 6(e)(3)(C)(i) is contained in Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958), wherein the Attorney Grievance Committee for the State of New York sought access to evidence presented to the grand jury concerning members of the State Bar. In reaching its decision that the materials should be released to the Grievance Administrator, the Court stated that the term "judicial proceeding" includes:

Any proceedings determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedures applicable to the punishment of crime.

255 F.2d at 120.

Case law reflects strong support for releasing grand jury evidence under Rule 6(e)(3)(C)(i) for the purpose of investigating and disciplining attorneys. In The Matter of Disclosure of Testimony before the Grand Jury, 580 F.2d 281 (8th Cir. 1978); United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980) (disclosure of grand jury testimony to the Committee of the Bar of the State of Connecticut necessary for use in an attorney disciplinary proceeding was preliminary to or in connection with a judicial proceeding within Rule 6(e)); In Re Barker v. Oregon State Bar, 741 F.2d 250 (9th Cir. 1984) (permitting disclosure to the Bar Grievance Administrator of grand jury materials relating to attorneys who had become the subject of an ongoing federal probe); In The Matter of Federal Grand Jury



Proceedings, 760 F.2d 436 (2d Cir. 1985) (hearings ordered by the Appellate Division and initiated by the Grievance Committee are a "judicial proceeding" within the meaning of the provision); In Re Petition to Inspect, 576 F. Supp. 1275 (S.D. Fla. 1983) (granting disclosure of grand jury evidence to Special Committee of the Judicial Council of the Eleventh Circuit). Disclosure under Rule 6(e) has been allowed to police discipline boards as well. In Re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); In Re Grand Jury Transcript, 309 F. Supp. 1050 (S.D. Ohio 1970).

In In The Matter of Electronic Surveillance, 596 F. Supp. 991 (E.D. Mich. 1984), a request was made by the Michigan Attorney Grievance Commission to obtain electronic surveillance evidence which had been compiled against attorneys. The



request was made by the Grievance Administrator in an attempt to determine if evidence that had been compiled by federal authorities would reflect on attorneys' fitness to continue as members of the State Bar. The district court permitted the Grievance Administrator access to the evidence under Federal Rule of Criminal Procedure 6(e)(3)(C)(i). In finding that the Attorney Grievance Commission's investigation was in fact "preliminarily to or in connection with a judicial proceeding", the court stated:

The procedures for attorney discipline in Michigan can likewise be characterized as judicial in nature. The State constitution vests the Michigan Supreme Court with the power to discipline its attorneys. The Michigan Supreme Court has delegated its disciplinary authority to the Attorney Discipline Board. A disciplinary proceeding is initiated by the filing of a complaint, called a "Request for Investigation", with the Grievance Administrator. If warranted, the Grievance

Administrator files a formal complaint with the Attorney Discipline Board. The initial decision whether to discipline an attorney is made by a hearing panel appointed by the Attorney Discipline Board. An aggrieved party may request that the Board review the hearing panel's decision. The Board's decision may be reviewed only through leave to appeal to the Michigan Supreme Court. . . . The Attorney Discipline Board exercises judicial power, so its determination may be considered a judicial proceeding under Rule 6(e)(3)(C)(i).

596 F. Supp. at 999.

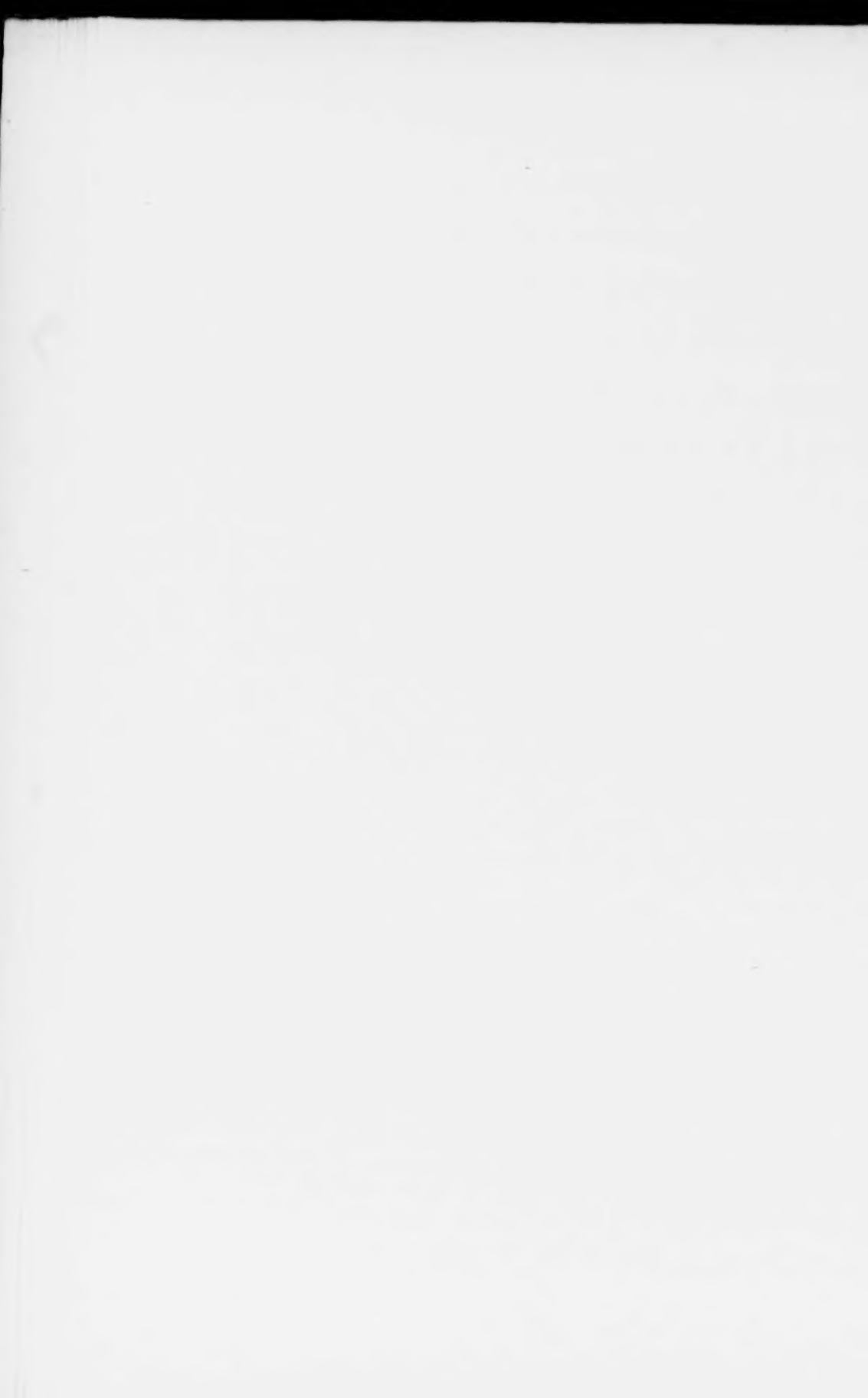
The Court of Appeals, in this case, erred in finding that the attorney discipline system created by the Michigan Supreme Court fell outside the scope of Federal Rule of Criminal Procedure 6(e)(3)(C)(i) "because the disciplinary proceedings are neither carried out before a judicial body, nor subject to sufficient judicial control." (Doe v. United States, No. 90-2219. (App. p. 17) The Sixth



Circuit Court mischaracterized the nature of the disciplinary proceedings and the degree of judicial control involved in the Michigan disciplinary system in determining whether the Commission's request for disclosure of grand jury materials was "preliminary to or in connection with a judicial proceeding."

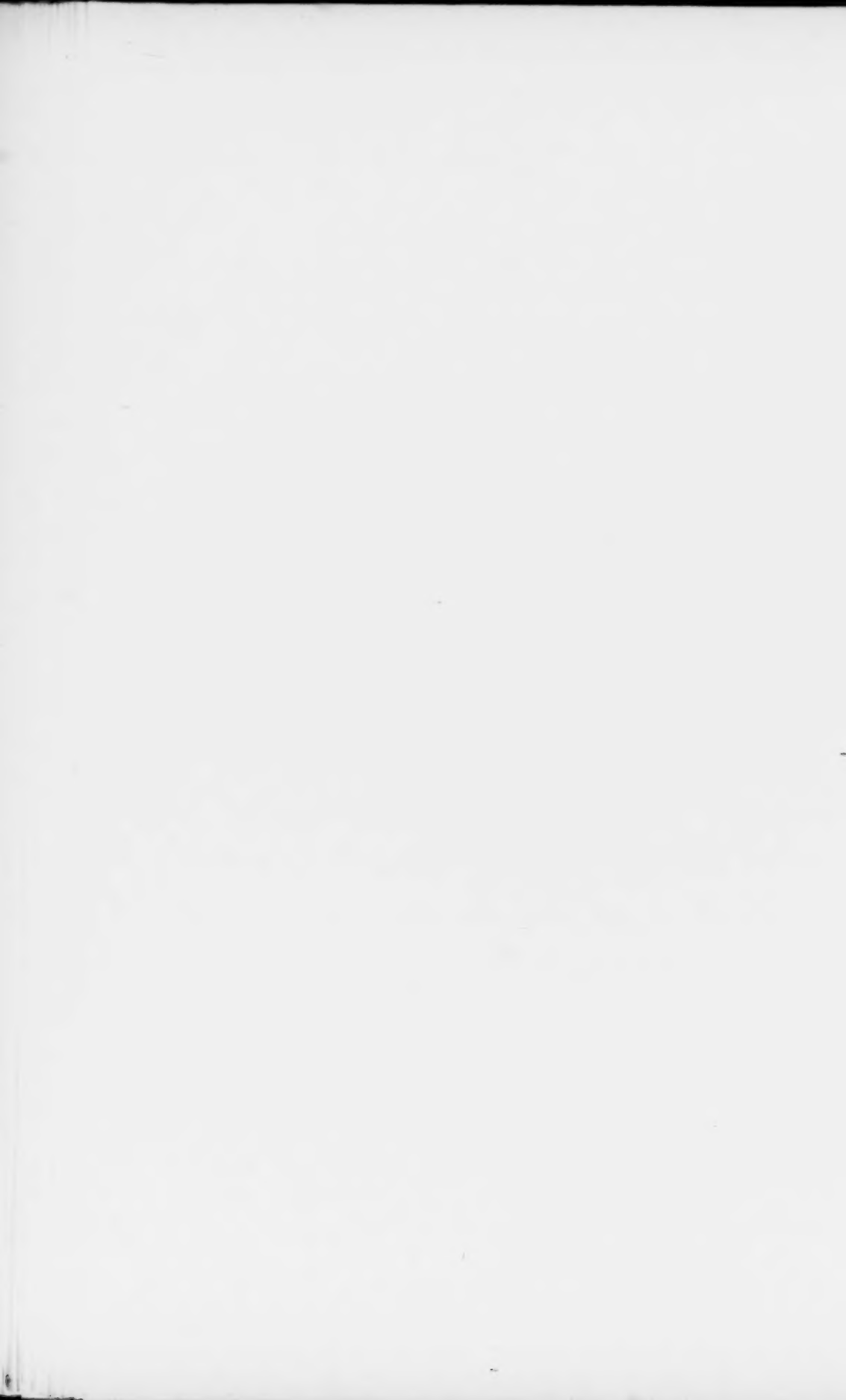
An accurate and careful review of the attorney disciplinary process in Michigan reveals substantial judicial involvement and supports the district court's finding that disclosure of the grand jury information was preliminary to a judicial proceeding. The constitutional power of the Michigan Supreme Court to discipline attorneys is granted by Mich. Const. art. VI Sec. 5. (App. p. 83) Michigan Court Rule 9.108(A) states:

(A) Authority of Commission.
The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of



its constitutional responsibility to supervise and discipline Michigan attorneys.

The Attorney Grievance Commission is a judicially-created investigatory and prosecutorial body and is empowered to conduct inquiries in connection with the conduct of attorneys. The Grievance Administrator and Deputy Grievance Administrator are appointed by the Michigan Supreme Court. The Grievance Administrator has the power and duty to "investigate alleged misconduct of attorneys, including serving a request for investigation in his own name." Mich. Ct. Rule 9.109. (App. p. 67) The Michigan Attorney Discipline Board is appointed by the supreme court to adjudicate these allegations of misconduct. Both the Grievance Commission and Discipline Board are subject to the supervisory control of the Michigan Supreme Court and as such, the proceedings are



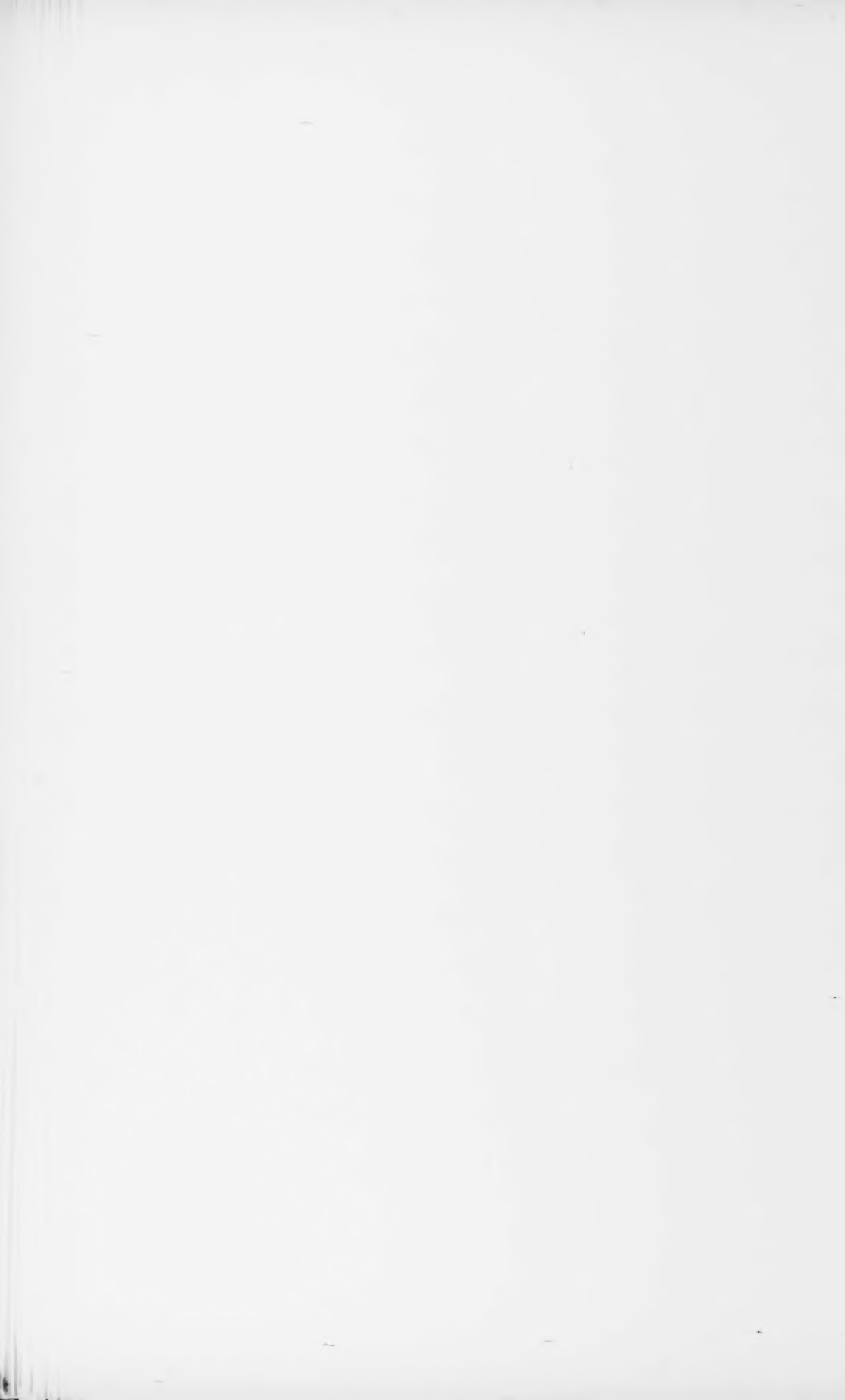
judicial in nature. Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972). The rules provide that the Attorney Grievance Commission, itself, can seek an injunction directly from the Michigan Supreme Court relating to an attorney's misconduct, even if a disciplinary proceeding concerning that conduct is not pending before the Attorney Discipline Board. Mich. Ct. Rule 9.108(E)(4). (App. p. 66)

The Michigan court rules governing attorney disciplinary proceedings, adopted by the Michigan Supreme Court, evidence the court's substantial "judicial involvement" in the disciplinary process. Pursuant to the Rules, the Michigan Supreme Court may order discipline including, revocation, suspension, reprimand, probation and restitution. Mich. Ct. Rules 9.106 and 9.108(E)(4). (App. pp. 61-63) A disciplinary proceeding, whether at the



investigative or adjudicative phase, is subject to the direct superintending control of the Michigan Supreme Court. Mich. Ct. Rule 9.107(A). (App. p. 63) Both the Grievance Commission and the Discipline Board clearly maintain a status far different from mere administrative agencies as characterized by the Sixth Circuit Court of Appeals.

The Michigan Supreme Court's rules not only provide for a review of discipline orders of the Board, but a party aggrieved by a dismissal of a Request for Investigation by the Commission may file a Complaint for Mandamus directly with the supreme court. Mich. Ct. Rule 9.122(A)(2). (App. p. 71-72) The Michigan Supreme Court may grant or deny the relief requested in the mandamus complaint, or enter any other order it finds appropriate, including an Order to Show Cause why the relief sought



in the Complaint should not be granted. Mich. Ct. Rule 7.304. (App. pp. 56-57) The Michigan Supreme Court also reviews and orders investigations relating to Requests for Investigation concerning members and staff of the Grievance Commission. Further, the supreme court directly reviews and investigates all Requests for Investigations filed by the Grievance Commission against an attorney representing a Respondent¹ or witness involved in a disciplinary matter. Mich. Ct. Rule 9.131(C). (App. p. 76)

Contrary to the finding of the Sixth Circuit Court that "the Michigan Supreme Court has chosen to totally delegate its state constitutional authority to discipline attorneys to the Michigan Attorney Discipline Board", the Michigan

¹A Respondent is the attorney under investigation.



Supreme Court has always maintained strict judicial control over attorney disciplinary matters and has always reserved final authority in discipline cases to itself. Michigan Court Rule 9.110(A) speaks specifically of the Court's "exclusive constitutional responsibility to supervise and discipline Michigan attorneys." (App. p. 71) This responsibility was further recognized in Matter of Grimes:

It is this Court, however, that has ultimate responsibility to oversee the conduct of the approximately 21,000 members of the State Bar, and keep unsullied the reputation of the profession. When an order of the Attorney Discipline Board is appealed, therefore, the Supreme Court may make any order it deems appropriate, including dismissing the appeal.

414 Mich. 448, 489-490, 326 N.W.2d 380, 383 (1982). (Emphasis added).

The Sixth Circuit Court's decision in this matter is replete with factual errors



concerning the structure and operation of the attorney discipline system in Michigan. The Sixth Circuit Court, in its order denying the Commission's Petition for Rehearing, stated that "the matters raised in the petition were fully considered upon the original submission and decision of the case." (Order June 20, 1991). (App. p. 47) In light of the glaring and repeated errors in the Sixth Circuit Court's decision, it is clear that the Court failed to understand and, in fact, totally mischaracterized the degree of judicial control involved in the Michigan disciplinary process.

In connection with its flawed understanding of the Michigan attorney discipline system, the Court misstated the role of the Attorney Discipline Board when it stated that it is the "Board's responsibility to investigate and



discipline attorneys suspected of misconduct. Mich. Ct. Rule 9.105." Mich. Ct. Rule 9.105 was incorrectly cited by the court, since neither that rule nor any other rule assigns an investigative function to the Board. As stated earlier, the Michigan Supreme Court has proclaimed that the Attorney Discipline Board is the "adjudicative arm" of the Supreme Court for discharge of the Supreme Court's "exclusive constitutional responsibility" to supervise and discipline Michigan attorneys. Mich. Ct. Rule 9.110. (App. p. 71)

The Court of Appeals also mischaracterized the nature of the disciplinary hearings before the Board as being "ex parte". (Doe Opinion) (App. p. 29) Attorneys charged with misconduct are entitled to notice of the charges, may be represented by counsel, are entitled to discovery and examination of witnesses.



The hearing itself is adversarial and the rules governing practice and procedure in a nonjury action apply to proceedings before a hearing panel. Mich. Ct. Rule 9.115. (App. p. 68)

Further, in describing the composition of the Commission, the Court of Appeals incorrectly described the manner in which members of the Commission are appointed. Every member of the Commission is a Michigan Supreme Court appointee. Mich. Ct. Rule 9.108(A)-(E). (App. pp. 63-67) Recently, the Michigan Supreme Court amended its rules so that now all members of the Attorney Discipline Board are appointed by the supreme court. Mich. Ct. Rule 9.110(A) and (B). (App. p. 71) Contrary to the Court of Appeals finding that the Commission appoints "one of its - attorney members to the position of Grievance Administrator," the Administrator



and Deputy Grievance Administrator are appointed by the Michigan Supreme Court and neither appointee is a member of the nine-member Commission. Mich. Ct. Rule 9.109. (App. pp. 67-68)

The Sixth Circuit Court's assertion that the Michigan attorney discipline system is funded by a "private organization" was also mistaken. (Doe Opinion, p.12) (App. p. 28) While the Sixth Circuit Court's position that the funding for the attorney disciplinary process is not provided by the Michigan Supreme Court was correct, the Court erred in referring to the State Bar of Michigan as a "private organization". The Michigan discipline system is funded by the State Bar which is a public agency that functions pursuant to rules and regulations prescribed by the Michigan Supreme Court. State Bar of Michigan v. Lansing, 361 Mich.



185, N.W.2d 131 (1960); Mich. Comp. Laws 600.904. (App. p. 82)

The primary rationale offered by the Sixth Circuit Court in support of its denial of the Attorney Grievance Commission's request for access to the grand jury materials, was the fact that appeals to the Michigan Supreme Court in disciplinary matters may be taken by leave only as opposed to appeal by right. The fact that appellate review from an Attorney Discipline Board decision is by leave, rather than by right, clearly does not take the proceedings outside Rule 6(e)'s exception. Every discipline case appealed to the Michigan Supreme Court is reviewed by the Court in that the decision to grant or deny leave is based on a review of the record and consideration of the issues



involved." Further, the number of cases in which leave is granted by the Michigan Supreme Court is not an accurate measure of the court's involvement in the discipline process since the court can, and does, modify actions taken by the Board in lieu of granting leave.' Interestingly enough, Doe #1 in this case has already filed two motions directly to the Michigan Supreme Court requesting various forms of relief. Doe #1 filed a Petition for Immediate Consideration and Motion for Writ of Superintending Control. (Order, Mich. S.Ct. No. 91391) The Michigan Supreme

When an application for leave to appeal is filed, the entire original Attorney Discipline Board file is transmitted to the Michigan Supreme Court for review.

Matter of Fernando Edwards, No. 87328, Mich. Sp. Ct., filed 12/05/90, the court denied leave to appeal but reduced an order of revocation issued by the Board to a suspension of three years.



Court, in its role as overseer of the disciplinary system, has already heard and decided Doe's motions. (Order, Mich. S.Ct., filed April 25, 1991). (App. p. 84)

Further, since January 1991, twelve disciplinary matters were brought before the Michigan Supreme Court. Moreover, Complaints for Mandamus brought against the Michigan Attorney Grievance Commission are filed directly with the supreme court and are reviewed by the court and decided on their merits.¹

The Court of Appeals without giving deference to the facts before it, erroneously found that the Michigan Supreme Court did not exercise "substantial judicial" control over attorney disciplinary proceedings, and therefore the

¹The Grievance Commission must immediately transmit its complete investigative file to the Supreme Court for review when a Mandamus Complaint is filed.

proceedings fell outside the scope of Rule 6(e)(3)(C)(i). The Michigan Supreme Court's judicial role is substantial and clearly defined by court rule. Attorney Grievance Commission investigations and prosecutions are properly characterized as preliminary to a judicial proceeding.

Finally, the Sixth Circuit Court also misconstrued the holding in United States v. Baggot, 463 U.S. 476, 480 (1983), in its decision to reverse the district court's ruling in this matter. Actual judicial redress is not a requirement before certain agency actions can qualify as preliminary to a judicial proceeding. The Court in Baggot did not discuss the definition of "judicial proceeding," but rather focused on whether the grand jury material sought was to be actually used to assist in preparation of a judicial proceeding.

The Sixth Circuit Court, in reversing the district court in this matter, based its ruling on the fact that disclosure to a disciplinary committee can only be made when disciplinary proceedings are heard or reviewed by a judicial tribunal. However, none of the decisions cited by the Sixth Circuit Court specifically hold that judicial review or actual judicial participation in the proceedings was required before grand jury disclosure to a disciplinary authority can be permitted. Nothing in the decisions relied on by Sixth Circuit Court specifically preclude a finding that the Michigan disciplinary system falls within Rule 6(e)'s exception.

The disciplinary system in Michigan is similar to systems in other jurisdictions. Further, the goals and aims of the Michigan system are identical to the disciplinary systems of every other state which have



been granted disclosure of grand jury evidence. The Michigan Attorney Grievance Commission should not be denied the same access to grand jury materials as that granted other disciplinary agencies in the United States. Just as those agencies have an interest in protecting the public and integrity of their legal system, the Michigan Attorney Grievance Commission should be afforded the same right in protecting these interests in Michigan. To deny equal access to the Commission simply because judicial review is by leave, rather than by right, would seriously impede the Commission's duty to enforce rules relating to attorney misconduct.

B. The United States Supreme Court, In Adopting Rule 6(e) Of The Federal Rules Of Criminal Procedure, Did Not Intend Of The Federal Courts To Impose A Rigid And Inflexible Standard When Considering A Request For Disclosure Of Grand Jury Evidence Such As That Presented By The Michigan Attorney Grievance Commission.

The District Court's power to permit



the Attorney Grievance Commission access to grand jury materials should not stand or fall upon a rigid interpretation of Rule 6(e). In Re Petition to Inspect, 735 F.2d 1261 (11th Cir. 1984). Even if the procedures for which the grand jury materials are being sought may not be a "judicial proceeding" in the strict sense, Michigan disciplinary procedures are substantially similar or at least closely analogous to the situations for which the Rule 6(e)(3)(C)(i) exception was created. In Re Petition to Inspect, supra.

Although the situation in Doe, squarely fit within the Eleventh Circuit Court's ruling in In Re Petition to Inspect, the Sixth Circuit Court refused to permit disclosure of the requested material. The Eleventh Circuit Court held that although disclosure to a judicial investigating committee could not be



characterized as a judicial proceeding within the precise language of Rule 6(e)(3)(C)(i), disclosure was not strictly confined to instances spelled out in the rule. 735 F.2d at 1268. The Eleventh Circuit Court of Appeals endorsed the district court's fashioning of an alternate method of disclosure based upon the Court's general supervisory authority over grand jury proceeding and records. The Court held that since the judicial character of the circuit council's procedures "closely mirror" a judicial proceeding, the council's task of inquiring into judicial misconduct was little removed from the judicial proceedings encompassed within Rule 6(e)(3)(C)(i):

Actions by a circuit council or the Judicial Conference do not, therefore, exactly fit within Judge Learned Hand's widely quoted definition of a "judicial proceeding"---that; it "includes any proceeding determinable by a court...." By the same token,



impeachment proceedings before Congress, which are a possible outcome of this investigation, are not by a "court," although the Congress becomes something like a court for this purpose.

Nonetheless, while a committee's investigation is thus perhaps not ancillary to a "judicial proceeding," in the strict sense, the judge-run proceedings with which it is connected fit within Justice Holmes's definition of a "judicial inquiry":

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908). Under that definition, a state court's bar disciplinary proceeding has been characterized as a judicial inquiry.

735 F.2d 1261 (11th Cir. 1984) (other citations omitted).

Further, Rule 6(e) has been repeatedly amended to incorporate subsequent



developments in decisions of the federal courts. (i.e. access to IRS, other government personnel, other grand juries.) The history of amendments to Rule 6(e) indicates that the exceptions permitting disclosure are subject to developments by the courts. The court noted:

The Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances ... Accordingly, we do not believe that the district court's power to permit the Committee access to the otherwise secret grand jury minutes must stand or fall upon a literal construction of the language of Rule 6(e).

734 F.2d at 1269.

A strong argument is therefore presented, that in light of overwhelming case law allowing access of grand jury materials to bar disciplinary committees, Rule 6(e) should be amended to explicitly permit access to materials which are necessary for investigating and enforcing

violations of the rules of professional responsibility.

Like the circuit council in In Re Petition to Inspect, the disciplinary proceedings in Michigan satisfy procedural rights such as notice of the charges, compulsion of and the right to examine witnesses. Given the character of the Commission's procedures, and the "judicial inquiry" that comprises the Commission's task, the Michigan disciplinary process is "little removed from the judicial proceedings encompassed within the Rule 6(e)(3)(C)(i) exception." 735 F.2d at 1272.

The question under investigation by the Michigan Attorney Grievance Commission, whether one or more attorneys provided items of value to a court of appeals judge in exchange for favorable consideration of matters pending in the judge's court, is a

matter of great societal importance. The public's confidence in Michigan's entire legal system is at stake. The Commission should be allowed to examine whatever grand jury material is available to determine the truth or falsity of the charges. The Attorney Grievance Commission has an obligation and a right to assure the public that valid complaints are being considered in a forthright and just matter. A full and fair investigation by the Michigan Attorney Grievance Commission, designed to redress attorney wrongdoing and restore public confidence in the legal system, cannot be conducted without access to the grand jury materials. Permitting the Commission to have access to grand jury materials under these circumstances would be consistent with the policy and spirit of Rule 6(e). 735 F.2d at 1272.

C. Rule 6(e)'s Secrecy Provisions Are Inconsistent With The United States Attorney's Ethical Obligation To Report Attorney Misconduct Which Would Otherwise Go Undetected.

Michigan Rule of Professional Conduct 8.3 requires a lawyer having knowledge that another lawyer has violated the Rules of Professional Conduct to inform the Attorney Grievance Commission. Rule 8.3 states:

Rule 8.3 Reporting Professional Misconduct.

- (a) A lawyer having knowledge that another lawyer has committed a significant violation of the rules of Professional Conduct that raise a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.
- (b) A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judicial Tenure Commission.
- (c) This rule does not require disclosure of information



otherwise protected by Rule 1.6."

This rule is patterned after ABA Model Rule of Professional Conduct 8.3. (App. p. 80)

Assistant United States Attorneys involved in investigating Michigan attorneys or judges, who have knowledge that a Michigan attorney or judge has violated the Michigan Rules of Professional Conduct are obligated, under Michigan law, to report such misconduct to the Attorney Grievance Commission. This obligation is bestowed upon them by virtue of their license to practice law in Michigan. The above reporting requirement has also been adopted by the United States District Court for the Eastern District of Michigan by way of Rule 13 and Appendix A of the Local

"Rule 1.6 pertains to revealing confidences and secrets of a client.



Rules of the Court."

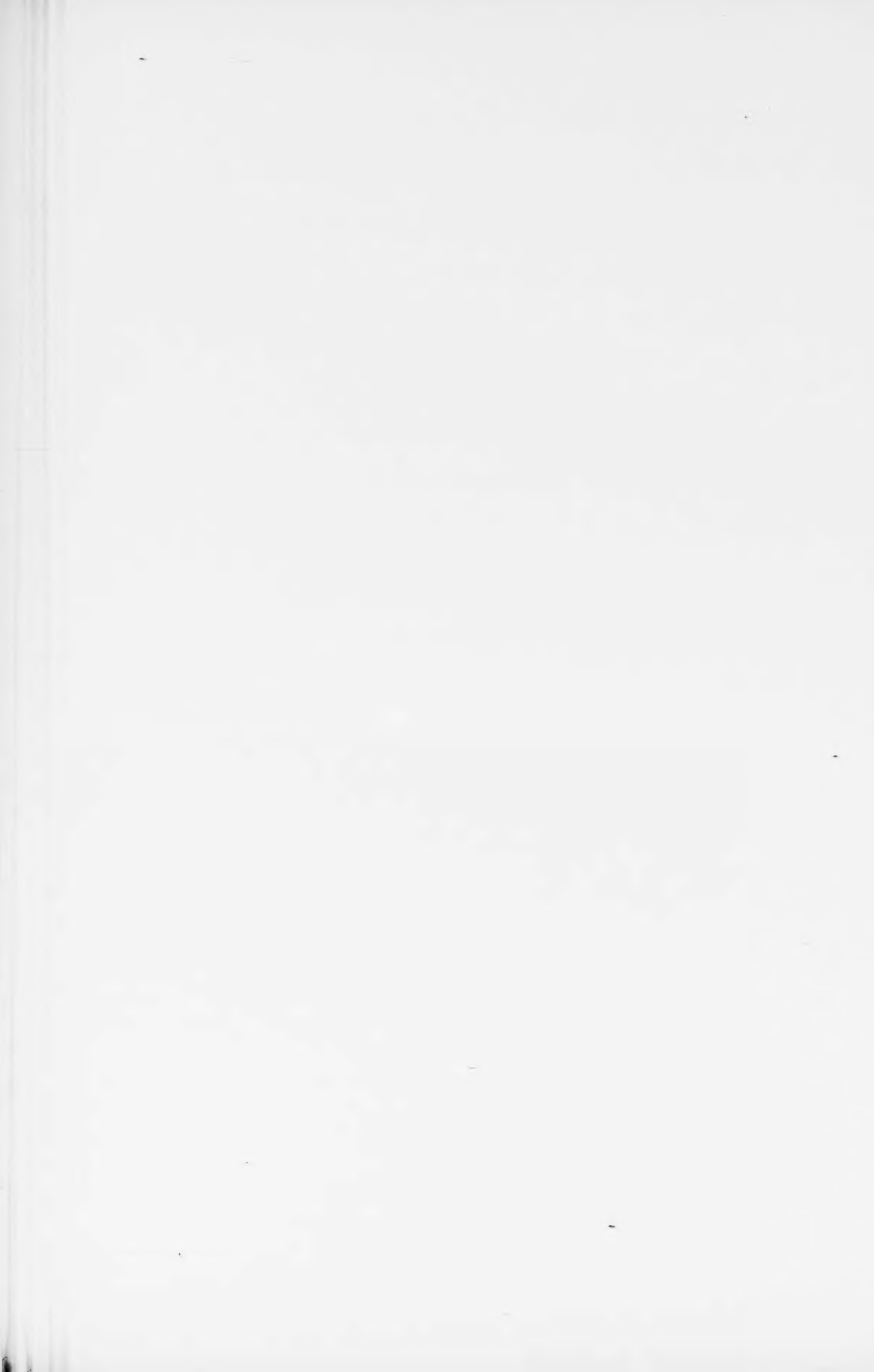
Therefore, a literal interpretation and rigid application of FRCP 6(e)'s secrecy requirements is inconsistent with the obligations and requirements imposed on Michigan attorneys to report attorney misconduct to the Commission. In situations in which an indictment is not returned, the grand jury secrecy provision places the United States Attorney and his/her staff of lawyers in the untenable position of violating the Rules of Professional Conduct by failing to disclose attorney misconduct.

"Rule A-4(b) states, in pertinent part:

The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Michigan Supreme Court as amended from time to time.

This Court should note that, at times, an indictment is not returned because of problems with the sufficiency of evidence for criminal charges. Although an indictment is not returned, there may remain strong evidence of ethical violations.

There is a compelling need for a state bar grievance committee to fully investigate, and if necessary, prosecute serious charges involving corruption of the legal process. The allegation in this case, that Doe #1 bribed a state court of appeals judge, is of paramount public interest for and concern to the legal profession. Rule 6(e) was not intended to allow an attorney who has violated the rules of professional conduct to go unpunished simply because a grand jury indictment was not returned.



II.

THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO APPLY STANDARDS ESTABLISHED BY THE UNITED STATES SUPREME COURT FORMULATED TO DETERMINE WHETHER A PARTICULARIZED NEED WAS DEMONSTRATED.

In its cursory discussion concerning the degree of need the Commission was required to establish for disclosure under Rule 6(e)(3)(C)(i), the Sixth Circuit Court failed to weigh the competing interests between continued secrecy and disclosure in light of the standards announced by this Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 99 S.Ct. 1867 (1979); United States v. Sells Engineering, Inc., 463 U.S. 442, 103 S.Ct. 3133 (1983); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940); Illinois v. Abbott and Assoc., Inc., 460 U.S. 557, 103 S.Ct. 1356 (1983).



In ruling that the district court's finding of a particularized need in this matter was insufficient to warrant disclosure, the Circuit Court relied on its recent opinion in F.D.I.C. v. Ernst & Whinney, 921 F.2d. 83 (6th Cir. 1990).⁷ However, a review of the Sixth Circuit Court's decisions in both Doe and Ernst & Whinney demonstrate a failure by the Sixth Circuit Court of Appeals to apply the proper standards relating to the question of a movant's demonstration of a particularized need. United States v. Proctor & Gamble, 356 U.S. 677, 78 S.Ct. 983 (1958).

The standard by which a district court's order of disclosure of grand jury evidence should be analyzed is set out in

⁷The judges writing the majority opinion in Doe also sat on the panel which decided Ernst & Whinney.



Douglas Oil v. Petrol Stops, Northwest, 441 U.S. 211, 99 S.Ct. 1667 (1979) wherein the phrase "particularized need" was described as including three factors:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and, that their request is structured to cover only materials so needed
...."

99 S. Ct. at 1674. See also, United States v. Sells-Engineering, Inc. 463 U.S. 418, 103 S.Ct. 3133 (1983); United States v. Proctor & Gamble, 356 U.S. 677, 78 S.Ct. 983 (1958). The Supreme Court, in Douglas Oil, went on to state:

It is clear from Proctor & Gamble and Dennis v. United States, 384 U.S. 855 [86 S.Ct. 1840, 16 L.Ed.2d 973 (1966)] that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of

demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification....

441 U.S. at 233, 99 S.Ct. at 1675.
(Emphasis added).

Later, in United States v. Sells Engineering, Inc., 103 S.Ct. 3133, 3149, (1983) this Court reiterated the federal courts' responsibility to strike a balance between the competing interests:

The "reduced" interest in secrecy is further diminished in this case when the identity of the party requesting access is considered. The Supreme Court has stated:

The Douglas Oil standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others....



In the instant matter, the Circuit Court in determining the existence of a particularized need, ignored the identity of the party requesting access to the grand jury materials. In this matter a state agency, with a duty mandated by the Michigan Supreme Court, to investigate attorney misconduct, sought evidence of possible attorney wrongdoing. The district court was not faced with a request from a private party in civil litigation as was the case in F.D.I.C. v. Ernst & Whinney, supra.

Courts have held that the burden to demonstrate a compelling need is reduced where disclosure is not simply sought by a private person for use in a judicial proceeding but rather by an "independent public body (Connecticut Grievance Committee) charged with the performance of a public duty in a wholly disinterested and



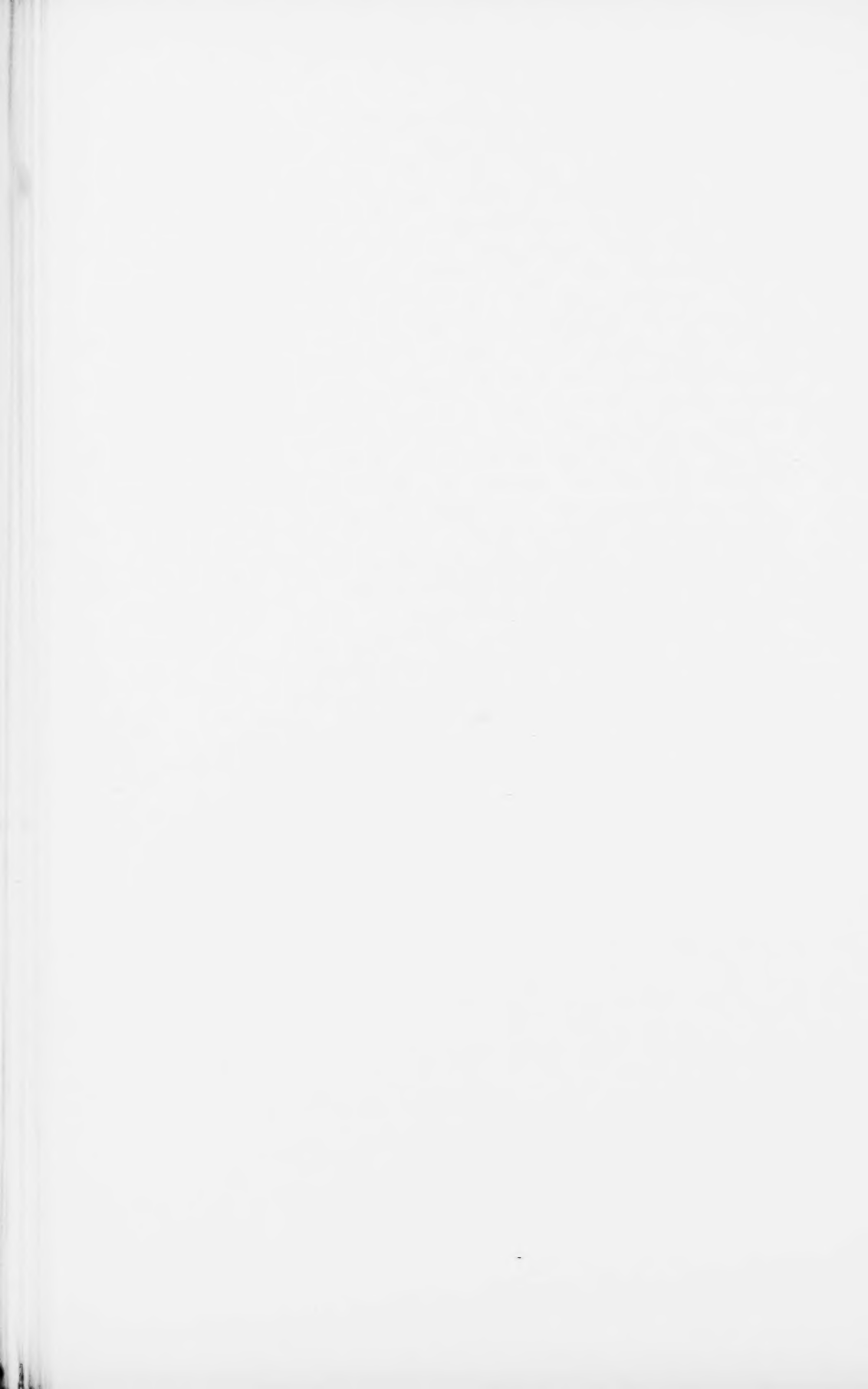
impartial manner." United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980), quoting Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 296 (S.Ct. Conn. 1930). The Michigan Attorney Grievance Commission is such a body. See also, Index Fund v. Hagopian, 512 F. Supp. 1122 (S.D. N.Y. 1981) (court distinguished between release of grand jury materials to the government or an official agency as opposed to a private party); United States v. Interstate Dress Carriers Inc., 280 F.2d 52, 54 (2d Cir. 1960) (court stressed that the grand jury documents were to be released "in furtherance of a lawful investigation").

The Circuit Court's decision also failed to consider the effect the disclosure would have on the policies underlying grand jury secrecy. Those policies are:



(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent the persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no possibility of guilt.

Douglas Oil Co. v. Petrol Stops,
Northwest, 441 U.S. 220, 99 S.Ct. 1667,
1673 n. 10. This Court has held that:
"[A]s the considerations justifying secrecy
become less relevant, a party asserting a
need for grand jury transcripts will have
a lesser burden in showing justification."
Douglas Oil, 99 S.Ct. at 1675; See also,



Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963); State of Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir. 1976); In Re Shopping Cart Antitrust Litigation, 95 F.R.D. 309 (S.D. N.Y. 1982).

The Sixth Circuit Court in Doe failed to weigh carefully the competing interests in light of the relevant circumstances. United States v. Sells Engineering, 463 U.S. 481, 103 S.Ct. 3133 (1983); Petrol Stops, Northwest v. Continental Oil, 647 F.2d 1005, 1008 (9th Cir.) cert. denied, 454 U.S. 1098, 102 S.Ct. 672 (1981); In Re Grand Jury Proceedings Relative to Perl, 838 F.2d 306 (8th Cir. 1988).

The Circuit Court also failed to recognize that the grand jury's investigation had terminated and that most of the reasons for grand jury secrecy were no longer applicable and the others were less compelling. Douglas Oil Co., 441 U.S.



at 223; In Re Grand Jury, 583 F.2d 128, 130 (5th Cir. 1978). The traditional reasons for cloaking grand jury proceedings have more force in relation to an existing grand jury. In Re Grand Jury Proceeding, 483 F. Supp. 411 (E.D. Penn. 1979). This Court has stated that, "After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." United States v. Socony-Vacuum Oil, Co., 310 U.S. 150, 60 S.Ct. 811, 849 (1940).

The first three policy reasons for grand jury secrecy as cited in the Douglas Oil case and set forth above clearly did not apply in Doe, since the grand jury had completed its investigation and had not returned an indictment. In The Matter of Electronic Surveillance, 596 F. Supp. 991, 996 (E.D. Mich. 1984). In Re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Penn.



1979).

Lapse of time between the grand jury proceedings and the motion for disclosure is a factor to be considered on the issue of the public interest in continued secrecy. The "need for secrecy may diminish with the passage of time." State of Illinois v. Sarbaugh, 552 F.2d 768, 776, n.12 (7th Cir. 1977). The grand jury proceedings relating to the Doe matter terminated some time ago. It has been one full year since the Commission requested access to the grand jury materials in this matter.

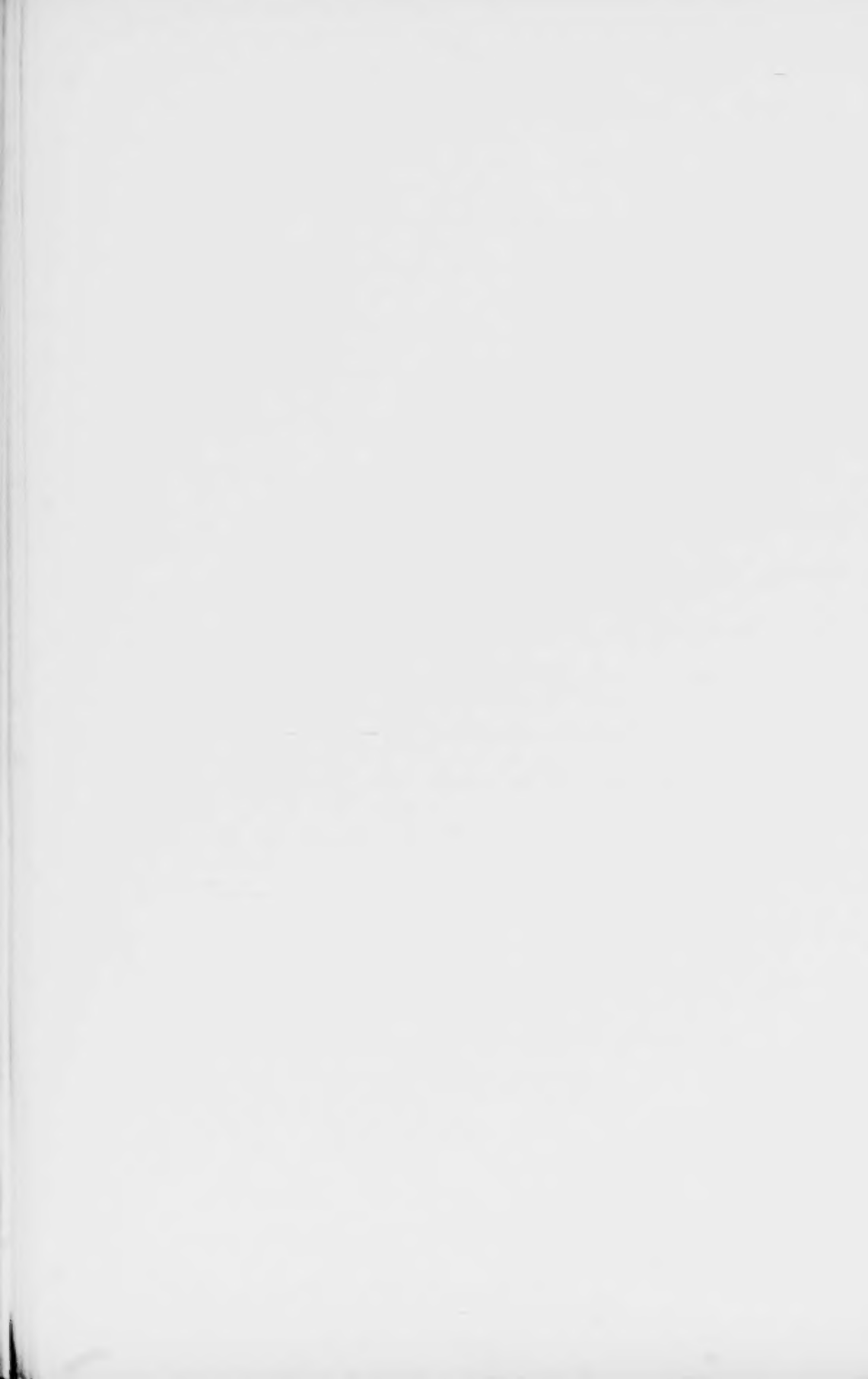
Later, in Sells Engineering, this Court declared that the standard for establishing a right to disclosure is not a rigid one but rather is "a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are



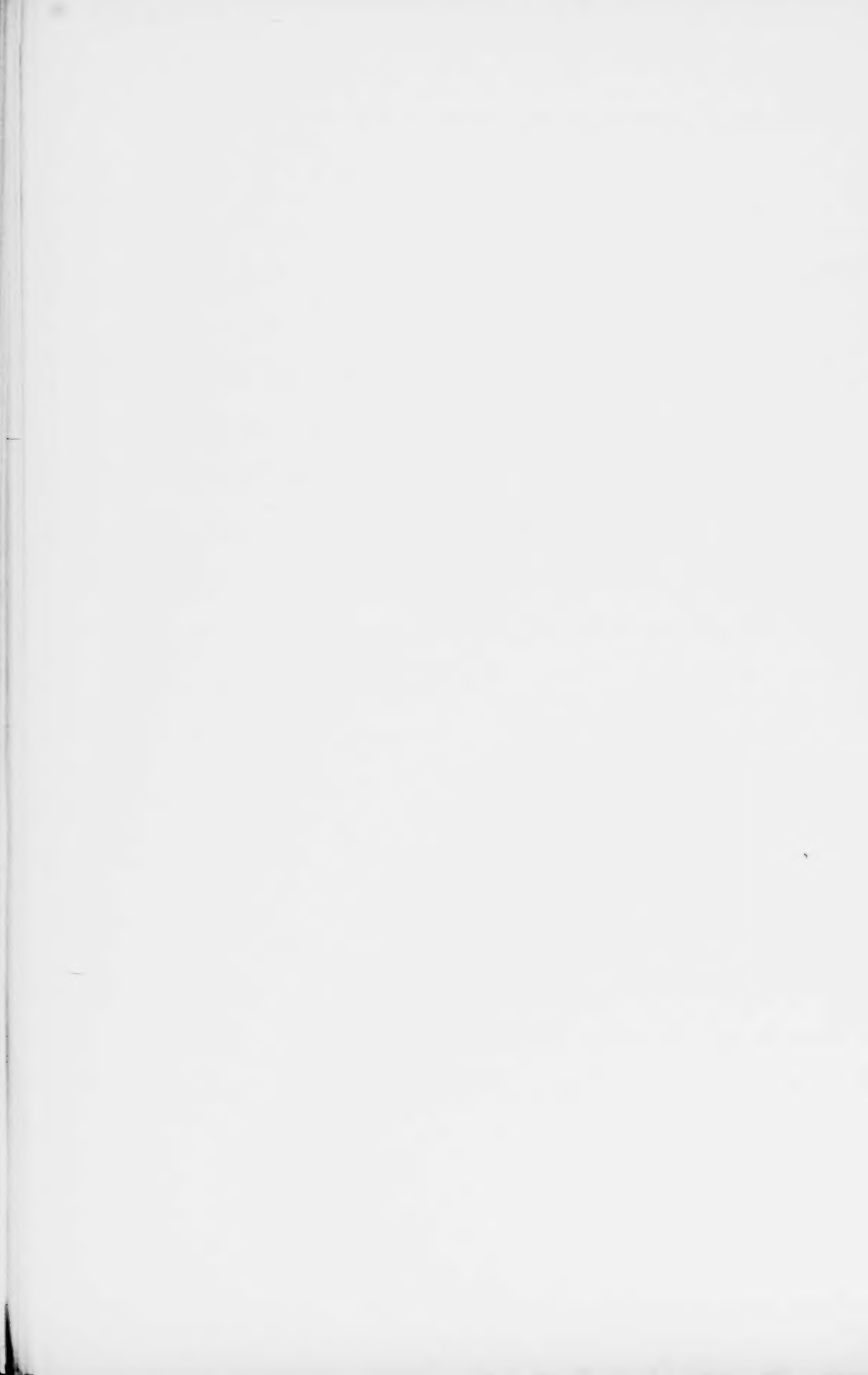
greater in some situations than in others."
103 S.Ct. at 3149.

Because the grand jury had ceased its investigation, there is no need to protect against the accused escaping before they were indicted and arrested. Finally, there is no risk of tampering with the witnesses or inhibiting the grand jury's investigation and deliberation. In The Matter of Disclosure of Testimony Before the Grand Jury, Etc., 580 F.2d 281 (8th Cir. 1978).

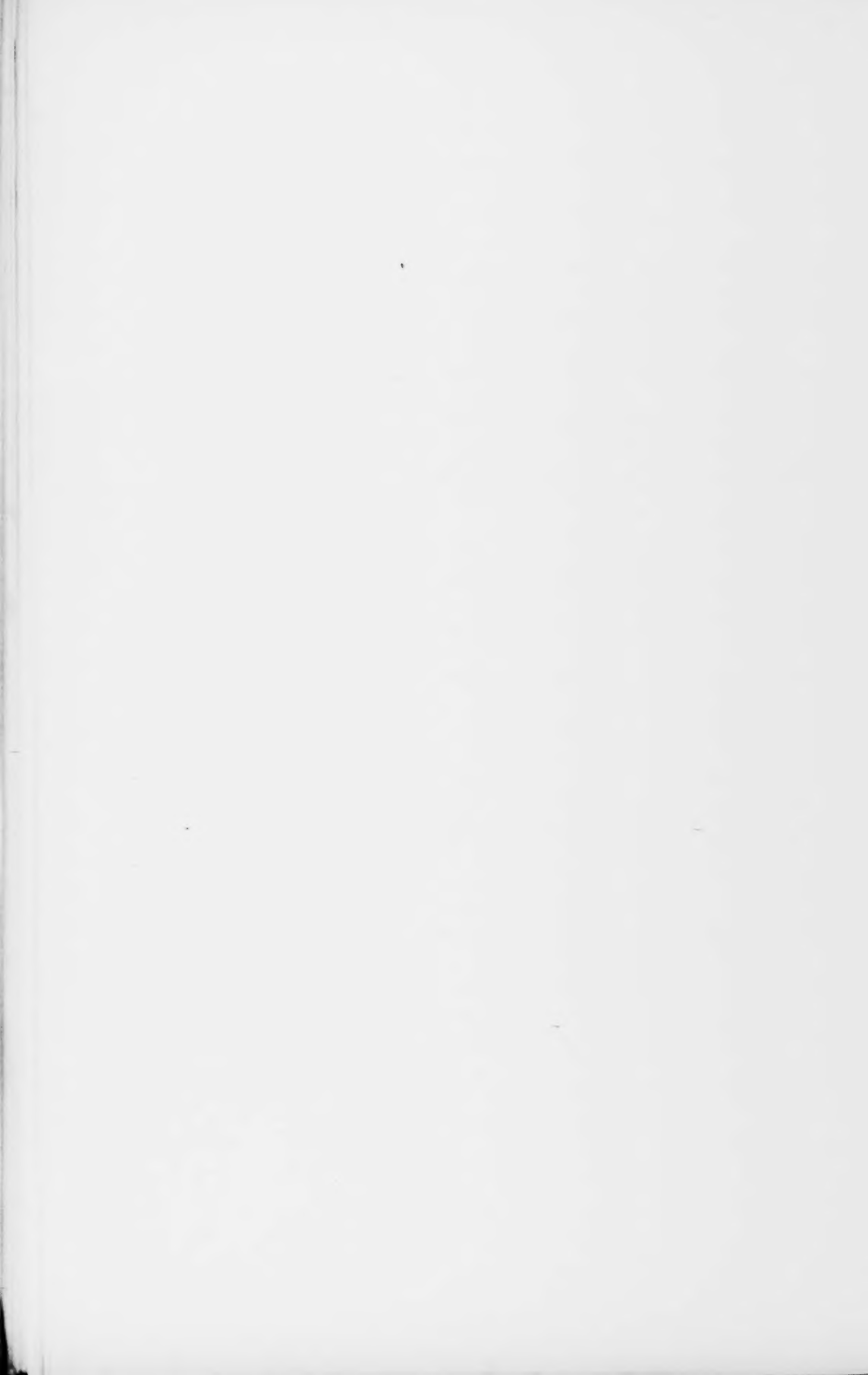
Furthermore, disclosure of the materials sought here will not frustrate the reasons for secrecy which exist after a grand jury's investigation is ended. The remaining reasons -- to protect the reputations of the innocent and to encourage persons to testify fully and freely before future grand juries -- are less compelling in this case. Illinois v.



Abbott & Associates, Inc., 460 U.S. 587, 103 S.Ct. 1356 (1983). First, the risk of injury to the reputations of innocent persons is slight because the Commission's investigations are confidential. Mich. Ct. Rule 9.126(A). (App. p. 74) The fact that an attorney is suspected of wrongdoing is not made public unless the Commission files a formal complaint with the Attorney Discipline Board. Mich. Ct. Rule 9.126; In The Matter of Electronic Surveillance, 596 F. Supp. at 996-997. For the same reason, the identities of the witnesses disclosed to the Commission would not deter others from testifying before future grand juries. The requirement of confidentiality imposed upon the Attorney Grievance Commission and its staff will be sufficient to protect the remaining limited interest in secrecy and will present minimal or no risk of leakage or improper use.

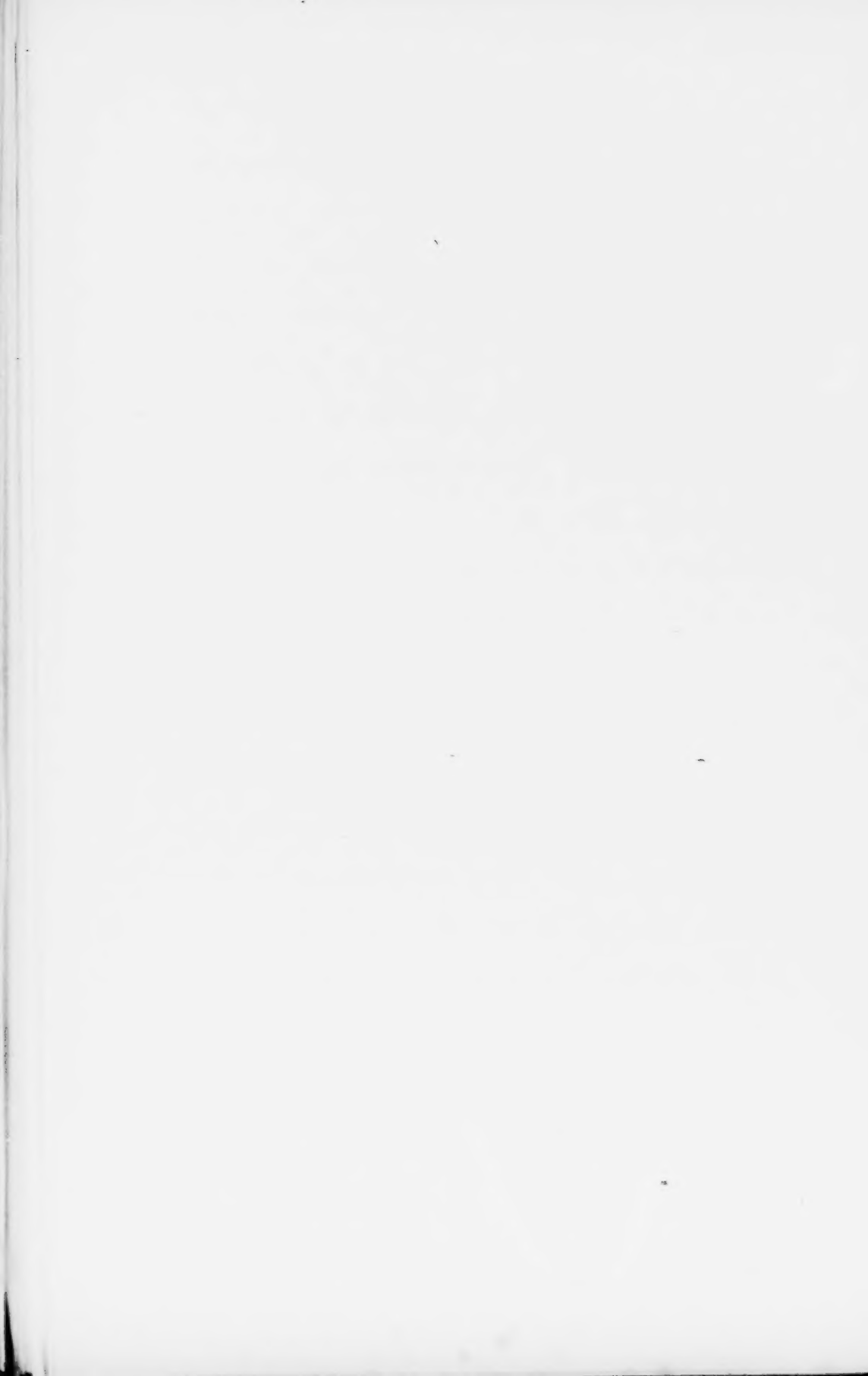


Lastly, it is important to note that the United States Attorney has conceded the minimal importance of preserving the secrecy of the grand jury. United States v. Climatedp, 482 F. Supp. 376 (N.D. Ill. 1979). The United States Attorney did not oppose the disclosure of the grand jury evidence in this case, thus conceding the minimal importance of grand jury secrecy in this matter and recognizing the Commission's need to obtain all relevant and material information contained therein. It would be an impossible task for the Commission to demonstrate its need with greater precision since as it has had no prior access to the evidence. While mere consent of the government alone does not automatically warrant disclosure of grand jury material, it is equally true that the objecting parties' interest in



confidentiality does not necessarily mandate non-disclosure. United States v. Climatemp, 482 F. Supp. 376 (N.D. Ill. 1979). In applying the standard set out by this Court in Douglas Oil, a district court is "infused with substantial discretion." The Sixth Circuit Court erred in finding that the district court had abused its discretion in this case.

Although a grand jury indictment was not returned against the attorneys who were the focus of the federal probe, the Commission learned that the investigation revealed serious violations of ethical rules governing the attorneys' conduct. Since there was no indictment, the Grievance Commission is not in a position to know whether it has investigated the people or events examined by the grand jury. It is the Attorney Grievance Commission's duty to investigate all



allegations of attorney misconduct. Failure to release the information being sought by the Commission will prevent a proper investigation of such misconduct. In Re Barker v. Oregon State Bar, 741 F.2d 250 (9th Cir. 1984).

In In Re Barker v. Oregon State Bar, the court stated:

Absent disclosure of the requested documents, it is clear that no disciplinary proceedings are likely to occur. Frustration of the Oregon State Bar's ability to investigate and sanction the attorneys who violate the rules of professional responsibility will be unjust. Its frustration in this case will also prompt injustice.

741 F.2d at 255.

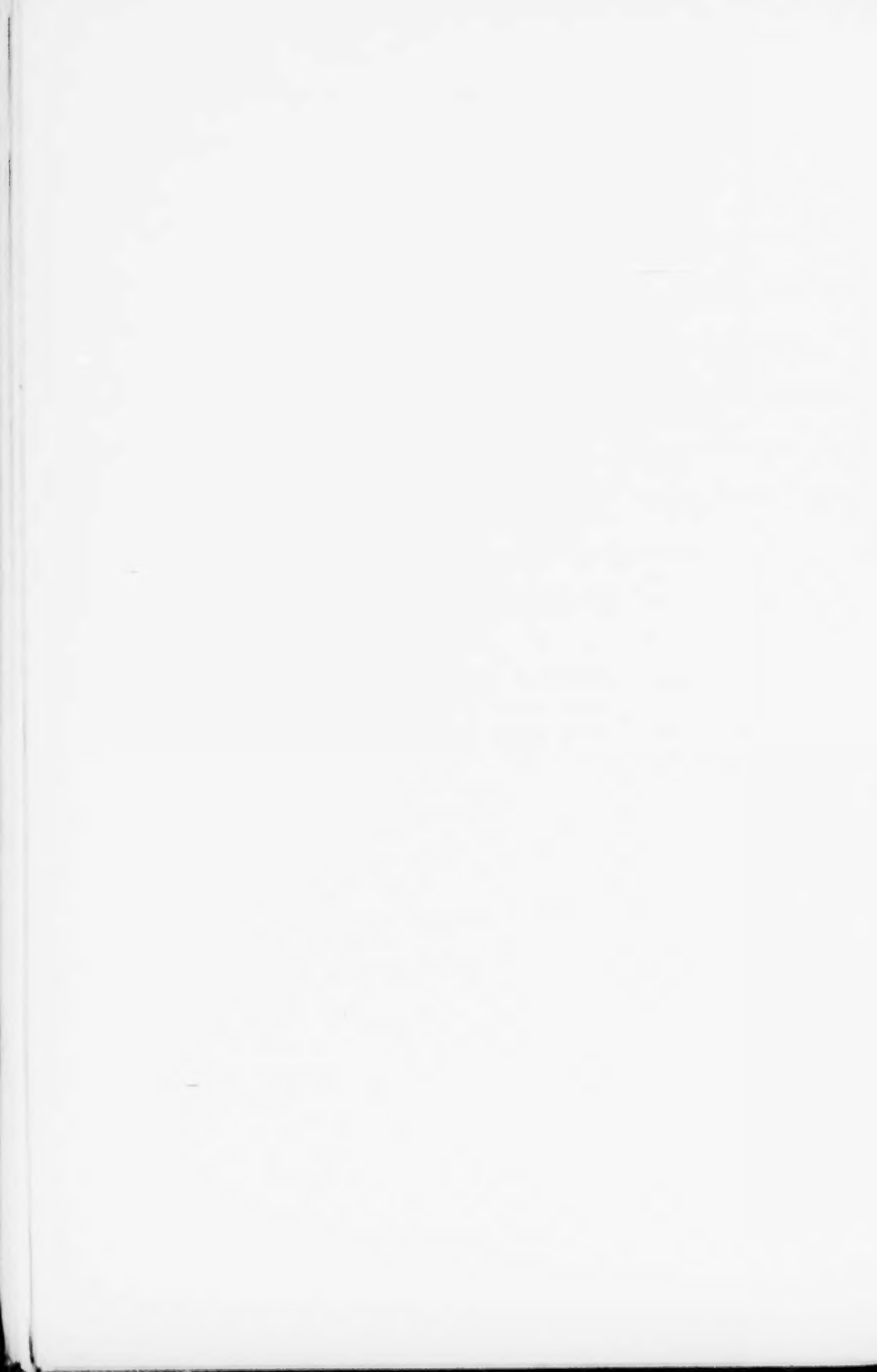
Whenever charges of corruption or unethical conduct of public officials surface, a compelling need for disclosure exists. In Re Bullock, 103 F. Supp. 639 (D.C. 1952); United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977); In Re



United States Order Pursuant to Provisions of Rule 6(e), 505 F. Supp. 25 (W.D. Penn. 1980).

In United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977), the Nebraska Committee on Judicial Qualifications petitioned to examine evidence submitted to a federal grand jury concerning judges. In deciding that the Judicial Qualifications Commission should be given access to the grand jury materials, the Court stated:

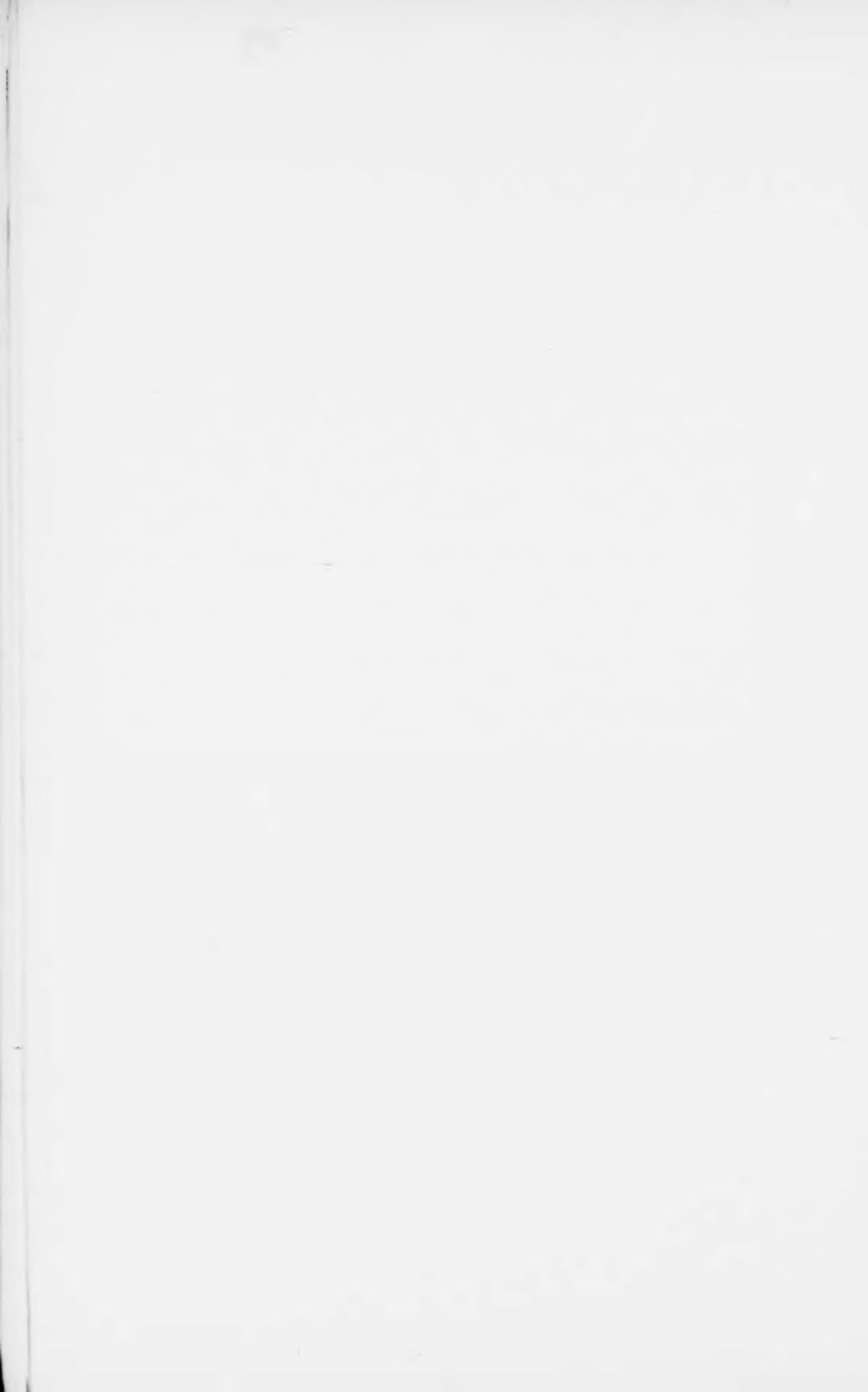
Whenever charges of corruption of public officials and employees surface, pointed attention to them is deserved. The integrity of the Courts is shaken by every misconduct of judges or lawyers, who are the court's officers. Neither the executive nor the legislative arm of the government is worthy of confidence, if its officers are corrupt Reestablishing faith in state and city governments by proving or disproving the faithfulness of their officials is a goal with enough urgency to carry a major part of a compelling and particularized need. Unless the information held by the Grand Jury can be acquired readily



another way, the primacy of the goal should be enough to allow re-evaluation of the Grand Jury testimony. 437 F. Supp. at 245.

In the case of In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd 735 F.2d 1261 (11th Cir. 1984) cert. denied, 105 S.Ct. 254 reh., denied, 105 S.Ct. 406 (1985), a "Special Committee" was appointed by the United States Court of Appeals for the Eleventh Circuit to investigate charges of misconduct brought against U.S. District Judge Alcee L. Hastings. In deciding that the grand jury materials being requested by the Judicial Standards Committee should be released the court stated:

. . . The Act requires a full, fair, and timely investigation by the Committee so that public confidence in judicial integrity and credibility may be preserved. Society is entitled to have a mechanism that works to the end that innocent judges and magistrates are protected in their reputations and independence and that the

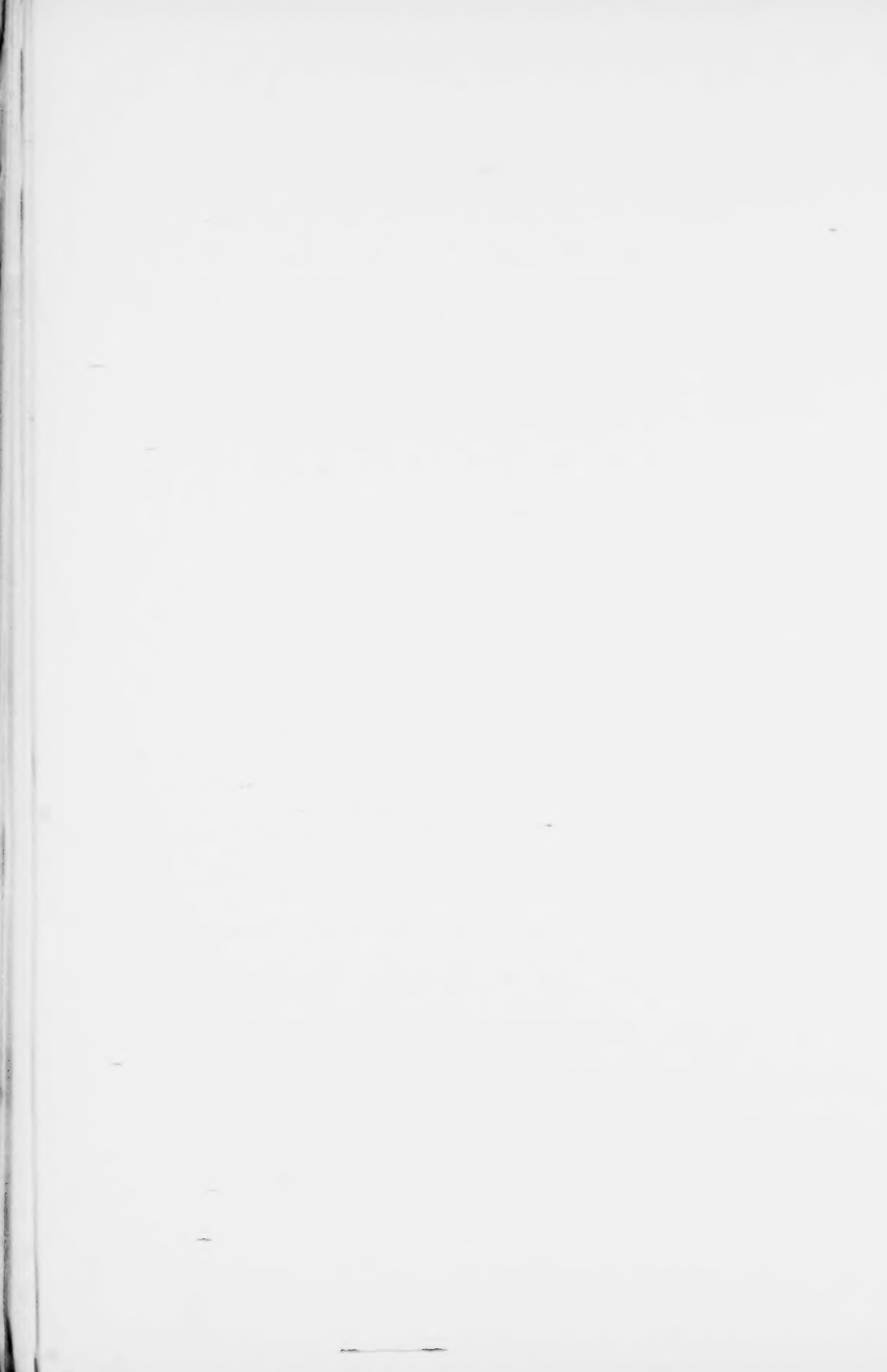


judiciary is kept honorable and
perceived to be so

576 F. Supp. at 1282.

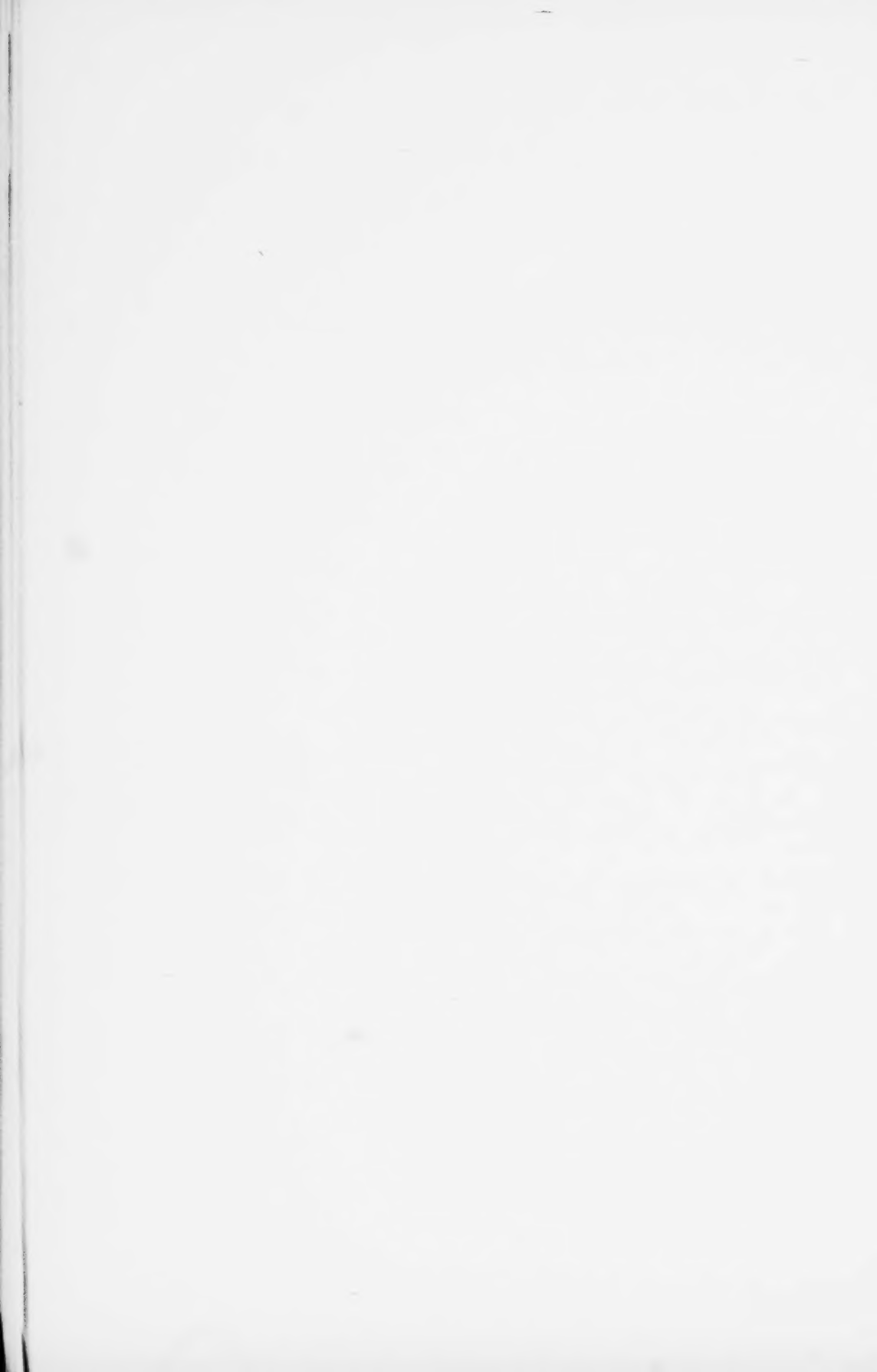
In In The Matter of Disclosure of
Testimony Before the Grand Jury, 580 F.2d
281 (8th Cir. 1978), the Council for
Discipline of the Nebraska State Bar
Association was held to be entitled to
disclosure where it demonstrated that state
investigations of improprieties by
attorneys and judges would be seriously
impeded without the release of certain
grand jury testimony. The court noted that
"the overall purpose of Rule 6(e), which
provides for grand jury secrecy and limited
disclosure exceptions, is to 'facilitate
efficient adjudication for the protection
of the public'." 580 F.2d at 287 (quoting
In re Special February 1971 Grand Jury v.
Conlisk, 490 F.2d 894, 898 (7th Cir.
1973)).

Finally, In Re Bullock, 103 F. Supp.



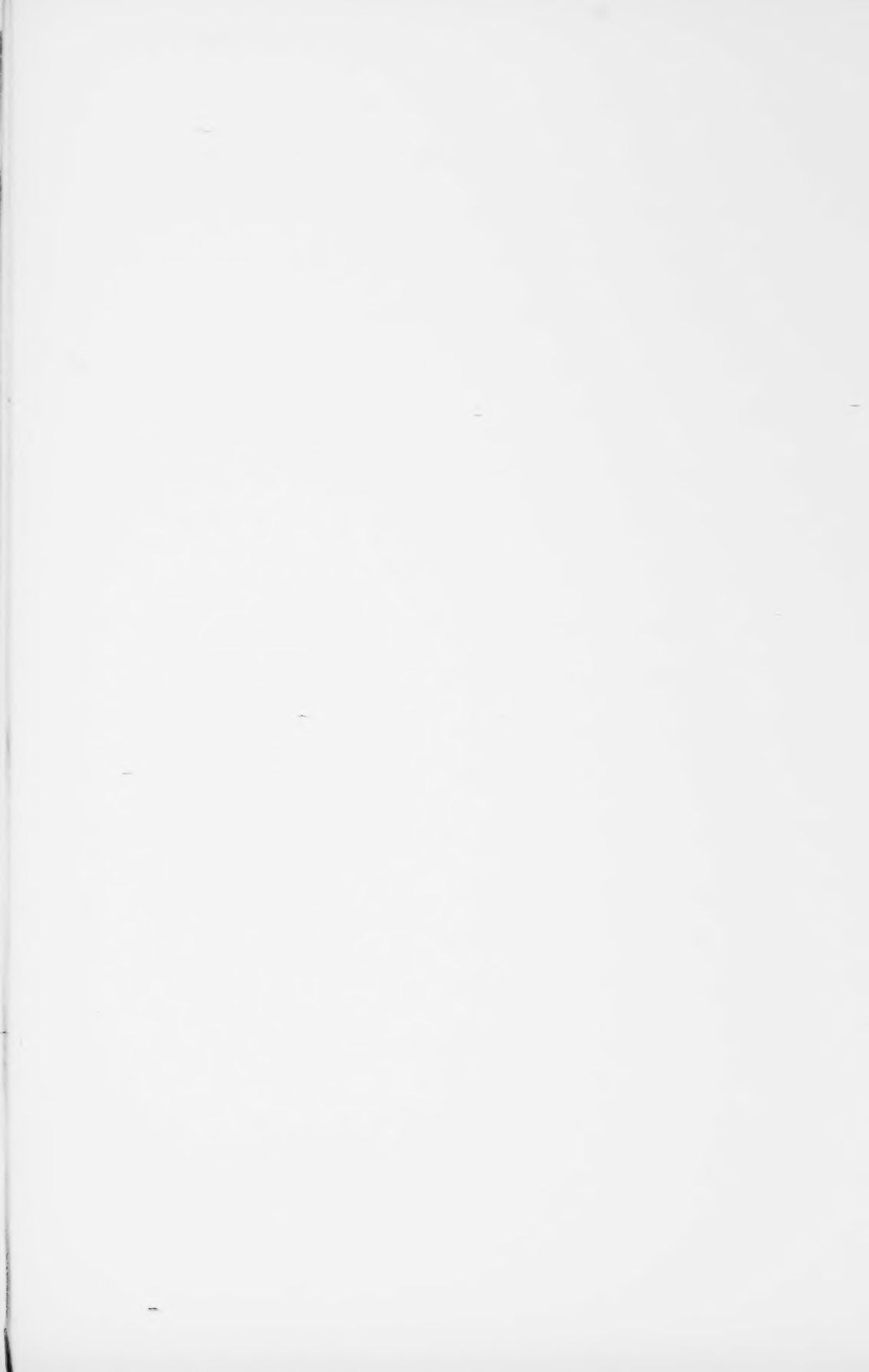
639 (D.C. Dist. of Col. 1952), the court released grand jury materials in connection with a proceeding to determine whether Bullock, a police officer, had been derelict in his duties. The maintenance of police integrity and credibility is essential to public confidence. The disclosure of grand jury evidence to a police board in order to discipline those abusing public offices was a public interest sufficient to override the policy shielding grand jury evidence from public scrutiny.

The Sixth Circuit Court's finding in the case, that the substantial public interest in the integrity of the bar was an insufficient particularized need, is inconsistent with decisions allowing disclosure based precisely on this type of interest. The reasons cited in the aforementioned cases permitting disclosure of



grand jury evidence to disciplinary committees are no different than those cited by the Commission in this case. In fact, a panel of judges from the Sixth Circuit Court of Appeals, assigned to hear a case by designation in the Eleventh Circuit, affirmed a District Court's ruling that a judicial investigating committee had established a particularized need by simply stating that a full review of the complete record of the grand jury was essential in order for the inquiry to be complete and "reach the degree of thoroughness necessary to ensure public confidence that justice had been done." In Re Request for Access To Grand Jury Materials, 833 F.2d. at 1440. Relying entirely on United States Supreme Court principles, the Sixth Circuit panel held:

Disclosure is appropriate only in those cases in which the need for disclosure outweighs the interest in secrecy. As the



considerations justifying secrecy become less relevant, the burden of showing the need for disclosure is lessened. After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. . .

The Committee has asserted a particularized need sufficient to warrant disclosure in this case. The Committee has asserted an interest in conducting a full and fair impeachment inquiry. The Committee's need for grand jury material, which may contain the freshest recollections of some of the key witnesses to the events being investigated by the grand jury, is particularly compelling in this inquiry, since the events which are the subject of impeachment inquiry took place some seven years ago.

833 F.2d. at 1442. (Emphasis added).

The Sixth Circuit Court, in Doe, failed to apply the principles noted above and further erred in finding that the particularized need of the Grievance Commission was insufficient to justify disclosure.

Additionally, the Court's statement in



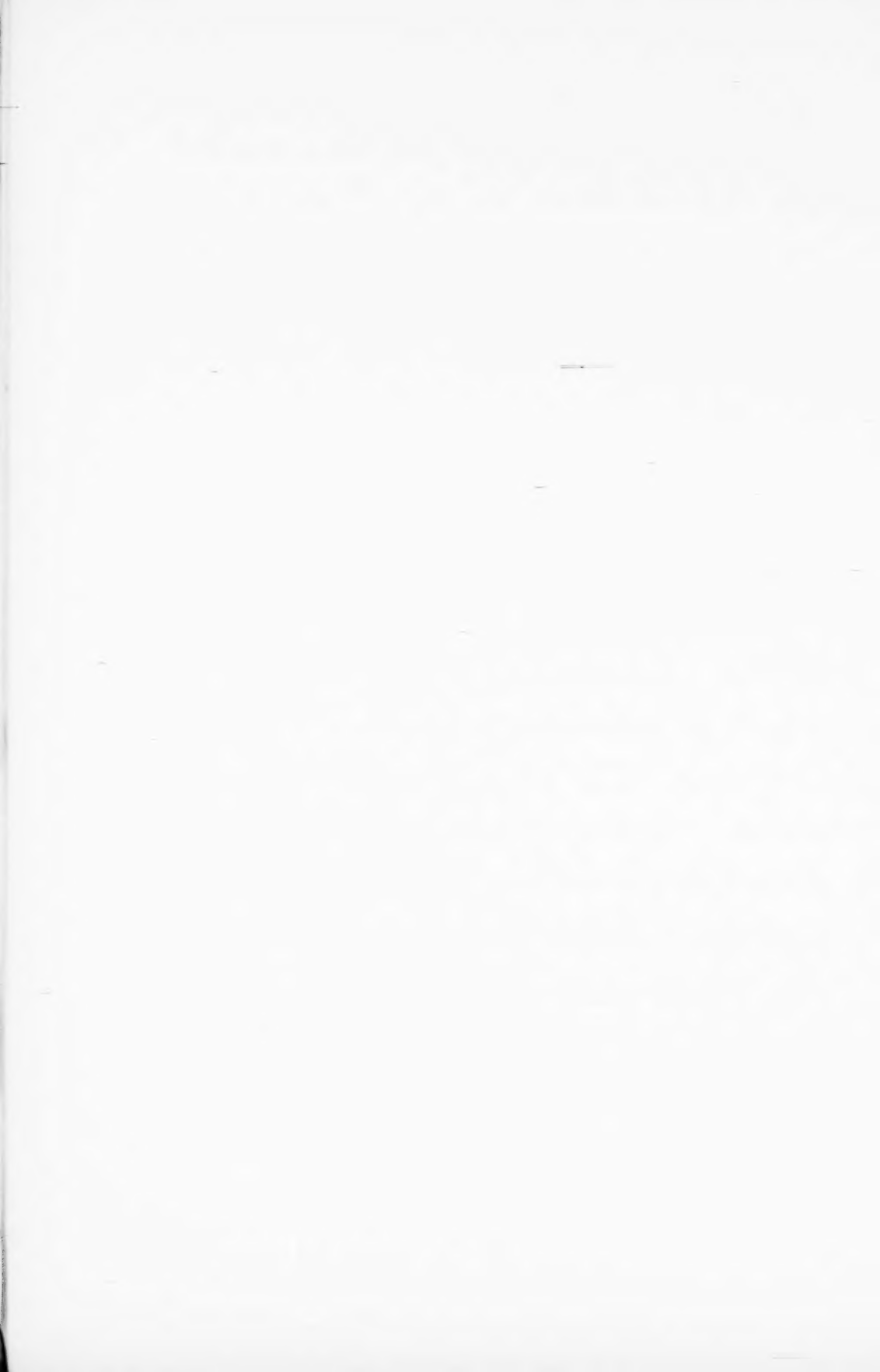
Doe that the "constitutional protection afforded by the secrecy of the grand jury is far more important, particularly in a case such as this one where the Commission holds the unused power to subpoena witnesses to gather its own evidence to protect the public" was also in error. (Doe Opinion, p. 13). The Commission has subpoenaed numerous witnesses and attempted to gather its own evidence in connection with this investigation. Due to the Commission's vigorous investigation of this matter, Doe filed an action for a protective order in the Michigan Supreme Court seeking to prevent further investigation by the Commission. Doe's request for relief was denied.

Lastly, Doe has failed to indicate any specific harm that would result from the disclosure of grand jury evidence in this case. 833 F.2d 1438. A mere generalized



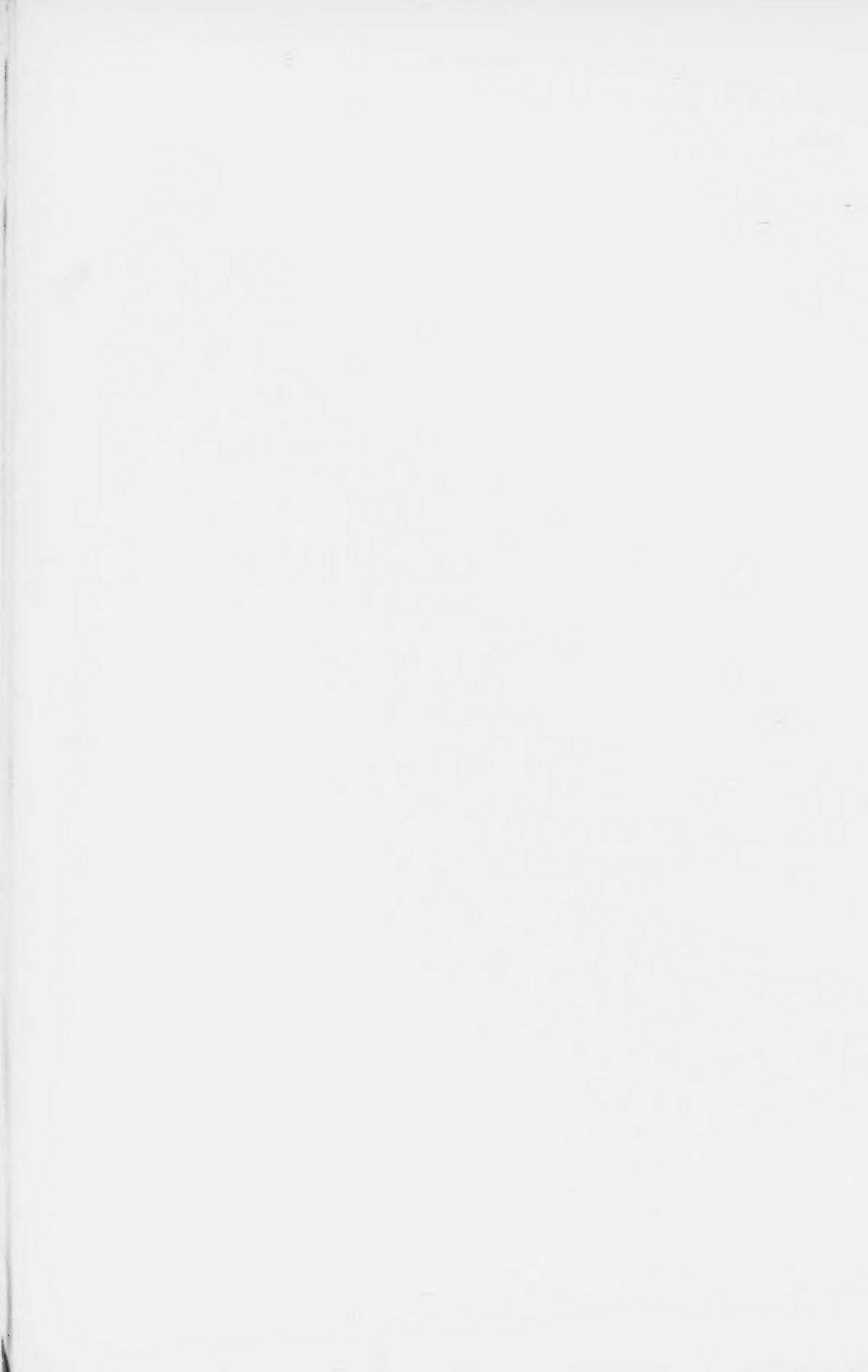
assertion of secrecy in grand jury materials must yield to the demonstrated need for evidence in an investigation relating to allegations of serious attorney misconduct. In Re Request for Access to Grand Jury Material, 833 F.2d 1438 (7th Cir. 1987).

The need for disclosure in this situation, to promote a strong public interest in the sanctioning of unethical attorneys, is overwhelming. "Where public interest is superior to the purpose of secrecy of grand jury testimony, the latter protection will be disregarded and the minutes divulged within the limits prescribed by law" In Re Grand Jury Transcript, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970) citing In Re Bullock, 103 F. Supp. 639 (D.C. Dist. of Col. 1952). The Michigan Attorney Grievance Commission represents the interests of protecting the



public, the courts, and the legal profession. State Bar v. Woll, 401 Mich 155 (1977); State Bar Grievance Administrator v. Gillis, 402 Mich. 286 (1978). Therefore a compelling and particularized need for disclosure exists.

To conduct a full and fair investigation and "reach the degree of thoroughness necessary to ensure public confidence," the Commission must have access to all available evidence. That access should not be denied to the Michigan Attorney Grievance Commission which is investigating serious allegations of attorney misconduct. In Re Request for Access of Grand Jury Materials, 833 F.2d at 1445.

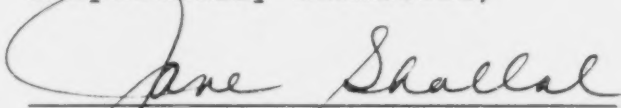


RELIEF

The Michigan Attorney Grievance Commission requests that plenary review be granted.

Dated: Detroit, Michigan
September 17, 1991

Respectfully submitted,

A handwritten signature in cursive script, reading "Jane Shallal". The signature is written in dark ink and is positioned above the typed name and address.

JANE SHALLAL (P-35151)
Deputy Grievance Administrator
Attorney Grievance Commission
Suite 256, Marquette Building
243 West Congress
Detroit, MI 48226
(313) 961-6585

91-484

Case No.

Supreme Court, U.S.

FILED

SEP 18 1991

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MICHIGAN ATTORNEY GRIEVANCE COMMISSION

Petitioner,

vs.

Doe #1

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Court of Appeals No. 90-2219

Petitioner's Appendix

JANE SHALLAL
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Counsel of Record



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OPINIONS AND ORDERS OF THE
SIXTH CIRCUIT COURT OF APPEALS



RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-2219

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: Grand Jury 89-4-72 \
JOHN DOE #1,
Petitioner-Appellant,
V.

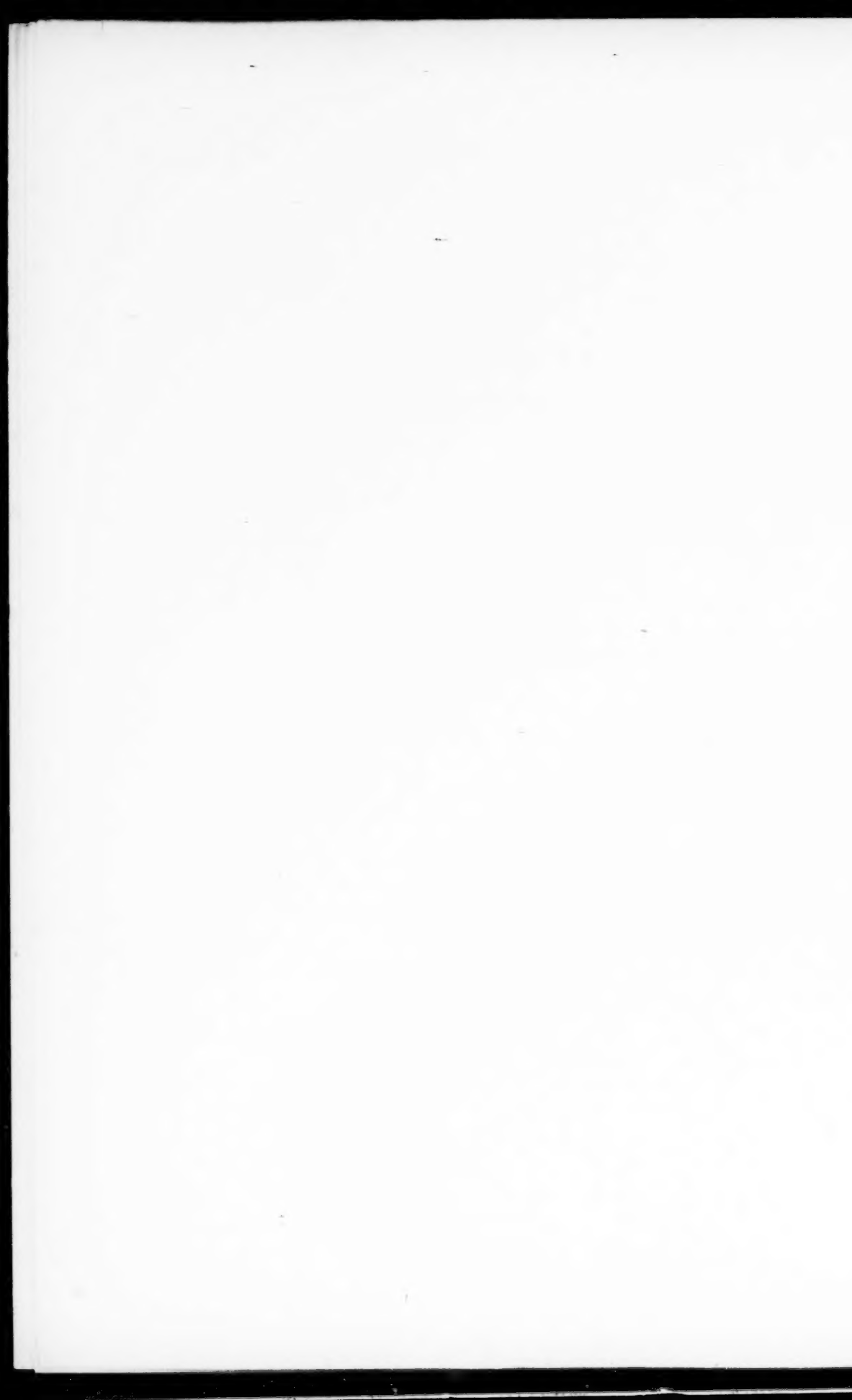
ON APPEAL
from the
United States
District
Court for the
Eastern
District of
Michigan
AMERICA,

UNITED STATES OF
District of Michigan
Respondent-Appellee,

MICHIGAN JUDICIAL TENURE
COMMISSION, MICHIGAN
ATTORNEY GRIEVANCE
COMMISSION,

Movants-Appellees.

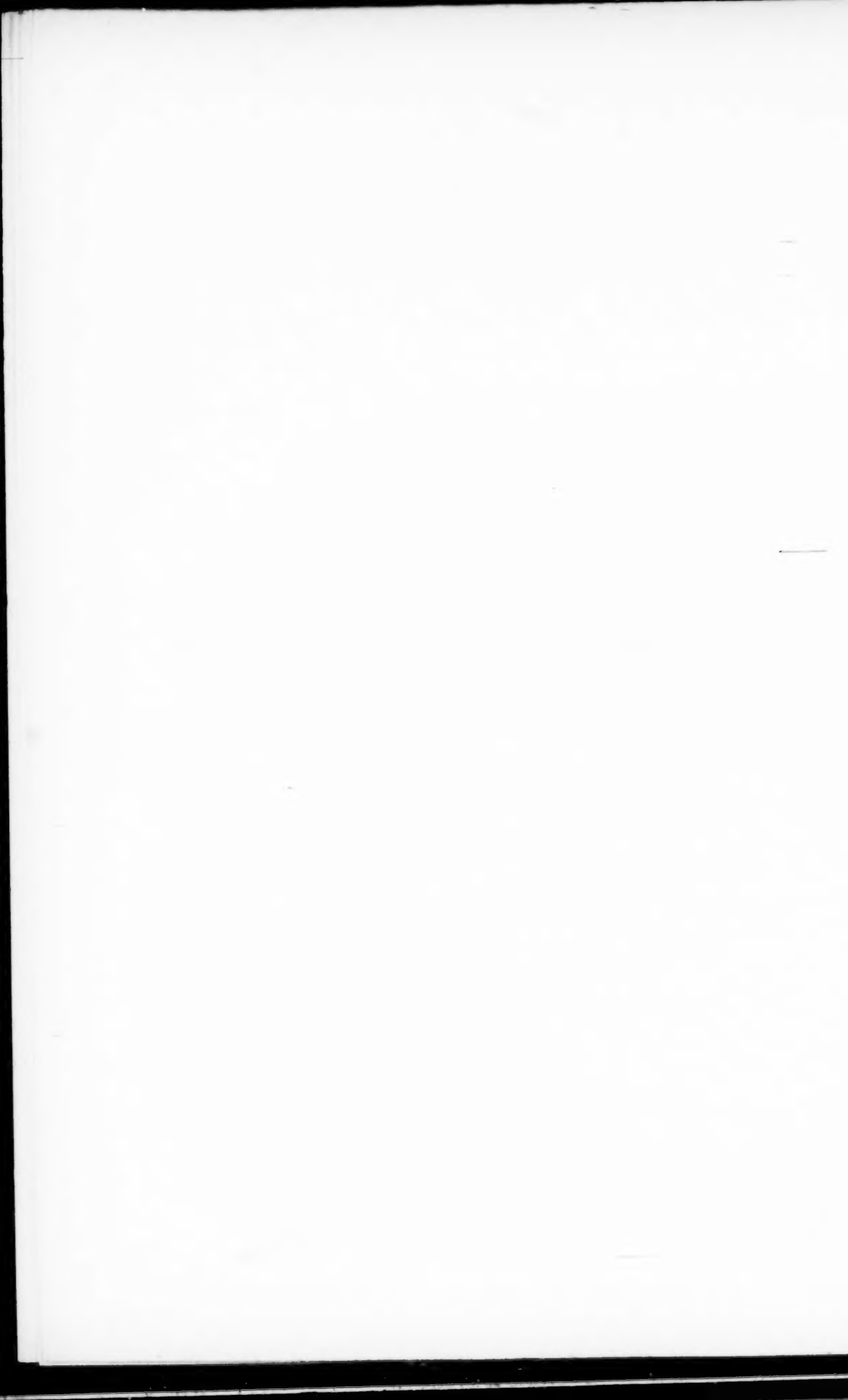
Decided and Filed April 26, 1991



Before: MARTIN and MILBURN,
Circuit Judges; and WELLFORD,
Senior Circuit Judge.

MARTIN, Circuit Judge, delivered the
opinion, in which MILBURN, Circuit Judge,
joined. WELLFORD, Senior Circuit Judge
(pp. 17-18) delivered a separate
concurring opinion.

BOYCE F. MARTIN, JR., Circuit
Judge. This matter comes before the court
on a motion to stay an order granting
disclosure of grand jury material gathered
in the investigation of a state judge
alleged to have engaged in inappropriate
dealings with attorneys who practice
before him. The sole issue on appeal is
whether the district court properly
granted the Michigan Attorney Grievance
Commission's request for disclosure of all
evidence presented to the grand jury that



might relate to possible criminal or unethical conduct by a Michigan attorney who, for lack of a better term, we shall refer to as Doe #1. Because the district court erred in concluding that disclosure to the Commission was "preliminary to or in connection with a judicial proceeding" and in determining that the Commission had demonstrated a particularized need for the evidence requested, we reverse.

This case arises from a federal grand jury convened in Michigan to investigate charges that a state judge has accepted items of value from attorneys in exchange for the favorable consideration of pending cases. Following the United States Attorney's submission of proof, the grand jury found insufficient evidence to indict. Despite the presumed secrecy of the proceedings, information which raised

serious questions as to whether a particular judge violated the canons and ethical standards governing judicial behavior was furnished to the Judicial Tenure Commission. The Michigan Attorney Grievance Commission received similar information regarding potential violations of the Michigan Rules of Professional Conduct and Ethical Standards by certain attorneys implicated in the investigation. As a result, both the Judicial Tenure Commission and the Attorney Grievance Commission requested the United States District Court for the Eastern District of Michigan to order the release of grand jury evidence, including recorded testimony, exhibits, and documents, to allow each to pursue an independent investigation. The United States filed a response to the Grievance Commission's request stating that it supported



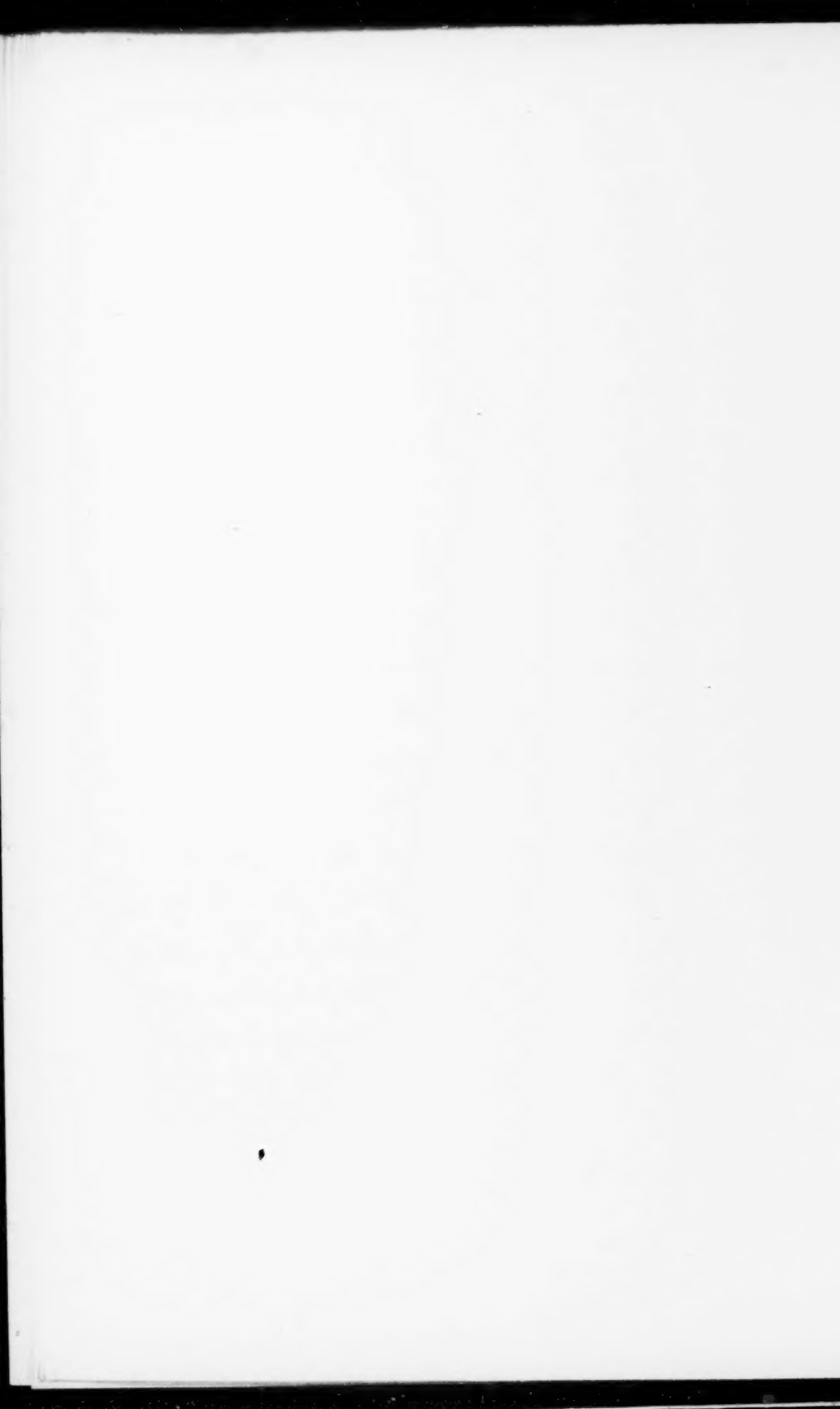
disclosure because the Commission's need for the information was "greater than the need for absolute secrecy."

On October 26, 1990, the district court issued a written memorandum opinion and order granting the Grievance Commission's request. Relying on In the Matter of Electronic Surveillance, 596 F. Supp. 991, 999 (E.D. Mich. 1984), the court concluded that disclosure was permissible under Rule 6(e)(3)(C)(i) of Fed. R. Crim. P. because an investigation by the Grievance Commission was a preliminary to a "judicial proceeding" within the meaning of the 6(e)(3), and because the Commission had demonstrated a particularized need for disclosure. The court granted the Judicial Tenure Commission's request for disclosure on similar grounds. Doe #1 filed a motion to stay the disclosure order pending appeal;



that motion was granted and notice of appeal was subsequently filed with this court. No notice of appeal has been filled [sic] by any individual under investigation by the Judicial Tenure Commission. Accordingly, only the disclosure request submitted by the Grievance Commission is currently before us.

Because the grand jury fills the unique institutional role of both "determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions[,]" it is vested with extraordinary investigatory powers not otherwise constitutionally permissible outside this setting. In the Matter of Grand Jury Investigation (Detroit Police Department Special Cash Fund), 922 F.2d 1266, 1269 (6th Cir. 1991)



(quoting Branzburg v. Hayes, 408 U.S. 665 (1972) (footnote omitted)). To ensure the grand jury access to full and frank disclosures, and to protect the innocent from grand jury abuse, the principle of grand jury secrecy has long been deeply ingrained in American legal jurisprudence. United States v. Sells Engineering, Inc., 463 U.S. 418, 424 (1983); United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958); Federal Deposit Insurance Corp. v. Ernst & Whinney, 921 F.2d 83, 86 (6th Cir. 1990). As the Supreme Court has stated, "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized." Sells Engineering, 463 U.S. at 425.

Rule 6(e)(2) of Fed. R. Crim. P. codifies the common law rule prohibiting the disclosure of any matters occurring



before the grand jury. Ed. R. Crim. P. 6, note to subdivision (e); Sells Engineering, 463 U.S. at 425. That secrecy, however, is not absolute. Rule 6(e)(3) authorizes five specific exceptions to the general rule of secrecy; only one, Rule 6(e)(3)(C)(i), is germane to this controversy. Rule 6(e)(3)(C)(i) establishes a two-step standard permitting disclosure of grand jury material otherwise prohibited to a party who demonstrates that (1) the disclosure is sought "preliminarily to or in connection with a judicial proceeding[,]" and (2) a compelling need for disclosure exists which will overcome the general presumption in favor of grand jury secrecy.

The restriction on the nature of the proceeding sufficient to trigger disclosure qualifies the kind of need that

must be shown, judicial need; the constraint as to the extent of need required for disclosure qualifies that degree of need, a compelling need. Sells Engineering, 463 U.S. at 424. The Former is a legislative determination reflecting

the judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy.... The focus is on the actual use to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted.

United States v. Baggot, 463 U.S. 476, 480 (1983). The latter is a judicial interpretation that the Rule itself requires more than minimal justification before a breach of secrecy will be permitted even to aid a judicial proceeding. See Douglas Oil Co. v. Petrol

Stops Northwest, 441 U.S. 211, 222 (1979). Both elements are related, but independent, prerequisites to (C)(i) disclosure. Baggott, 463 U.S. at 480. We shall address each separately.

I. NATURE OF THE COMMISSION PROCEEDINGS

The Grievance Commission argues that Michigan's attorney discipline proceedings are judicial in nature so that disclosure to the Commission would be preliminary to a judicial proceeding. Doe #1 argues that disclosure to the Commission is improper because the Michigan disciplinary proceedings are not themselves judicial in nature nor do they provide for a sufficient judicial role to be considered preliminary to a judicial proceeding. Doe #1 contends that the statutory structure providing for attorney



discipline reveals the Commission's investigation to be preliminary to an administrative proceeding, thus excluding it from the secrecy exception provided by Rule 6(e)(3)(C)(i). See, e.g., In Re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962) (Federal Trade Commission not entitled to grand jury evidence because request was preliminary to an administrative rather than judicial proceeding). We must therefore consider the "knotty question of what, if any, sorts of proceedings other than garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings under (C)(i)." Baggot, 463 U.S. at 479, n.2 (citations omitted).

The most commonly relied upon definition of a (C)(i) "judicial proceeding" is contained in Judge Learned Hand's opinion in Doe v. Rosenberry, 255



F.2d 118, 120 (2d Cir. 1958). See, e.g., United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); In Re J. Ray McDermott & Co., Inc., 622 F.2d 166 (5th Cir. 1980); Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973). The issue presented in Doe v. Rosenberry was whether disclosure of grand jury information to the Grievance Committee of the New York City Bar Association for a disciplinary investigation was permissible under rule 6(e). Doe sought to compel the bar association to return evidence obtained during a grand jury investigation. He argued that because attorney disciplinary proceedings are neither strictly civil nor criminal in nature, they are quasi-judicial and therefore outside the scope of 6(e)(3)(C)(i). The Second Circuit agreed that the action was quasi-judicial because



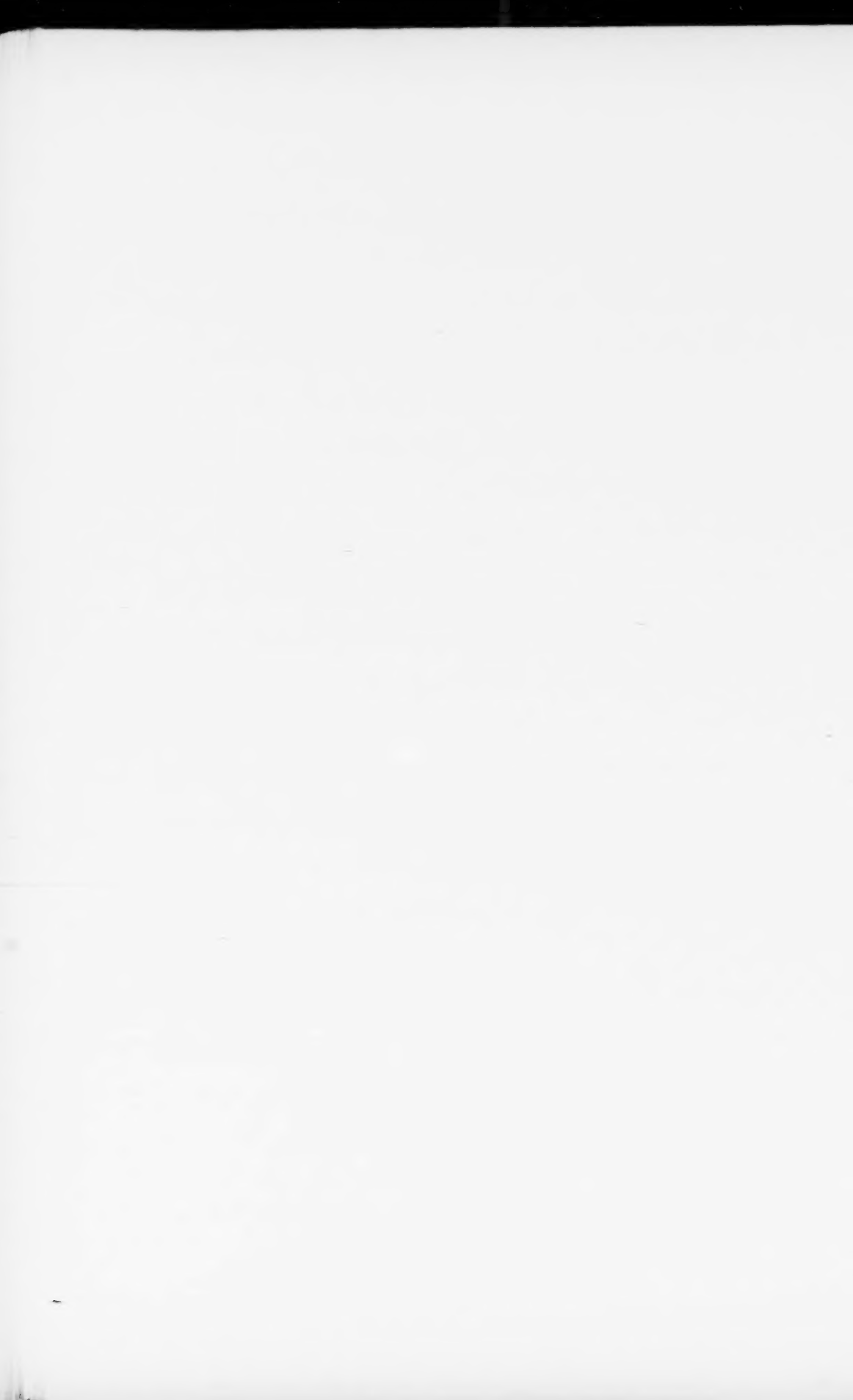
it could not properly be categorized as either criminal or civil. However, the court found the New York disciplinary procedures to be "judicial" in nature within the meaning of the Rule because they were presented before the Appellate Division of the New York Supreme Court. Id. at 119. Judge Hand felt the term "judicial proceeding" should not be read to preclude proceedings that were not in the ordinary course of a court's business. Rather, the Rule should be read to include

any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedures applicable to the punishment of crime.

Doe v. Rosenberry, 255 F.2d at 120.



Although commentators have criticized the Doe v. Rosenberry definition as little more than an exercise in semantics because it leaves the requirements for what constitutes a "court" and "subject to judicial control" unresolved, we find the gloss placed on Judge Hand's analysis by succeeding courts sufficient to adequately address the issue before us. Note, Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e), 70 Va. L. Rev. 1623, 1639 n. 84 (1984). Though Judge Hand spoke to quasi-judicial proceedings with regard to the nature of the action not its forum, courts interpreting Doe v. Rosenberry have used the term quasi-judicial in reaching differing conclusions as to the judicial role required to qualify certain agency actions as preliminary to a judicial



proceeding. Of particular concern has been whether the potential for judicial review of agency action would, in and of itself, establish that disclosure was preliminary to a judicial proceeding. Note, Federal Agency Access to Grand Jury Transcripts Under Rule 6(e), 80 Mich. L. Rev. 1665, 1670 (1982). That issue was settled by United States v. Baggot, 463 U.S. at 480, where the Supreme Court noted, "[t]he fact that judicial redress may be sought, without more, does not mean that the Government's action is 'preliminar[y] to a judicial proceeding.'

While Baggot settled perhaps the most fundamental controversy regarding 6(e)(3)(C)(i) disclosure, the issue remains open as to the degree of judicial involvement required to establish that disclosure of grand jury information is directed preliminarily to a judicial



proceeding. Other circuits have suggested that disclosure of grand jury materials to an administrative body, such as a bar disciplinary committee, may be considered preliminary to judicial proceeding where a significant judicial role exists in the operation of the regulatory/statutory scheme. In the Matter of Federal Grand Jury Proceedings (United States v. Doe), 760 F.2d 436 (2d Cir. 1985); In Re Barker, Wolf v. Oregon State Bar, 741 F.2d 250 (9th Cir. 1984); United States v. Bates, 627 F.2d at 349; In Re J. McDermott & Co., Inc., 622 F.2d at 166; Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980); In the Matter of Disclosure of Testimony Before the Grand Jury, 580 F.2d 281 (8th Cir. 1978). We agree with these cases, but find the attorney discipline mechanism employed by the State of Michigan to fall outside the scope of Rule 6(e)(3)(C)(i)

because the disciplinary proceedings are neither carried out before a judicial body, nor subject to sufficient judicial control.

Unlike many states in which bar disciplinary proceedings are heard before a judicial tribunal, the Michigan Supreme Court has chosen to totally delegate its state constitutional authority to discipline attorneys to the Michigan Attorney Discipline Board. M.C.R. 9.110(A) & (C)(5). The Attorney Discipline Board is a privately funded agency comprised of two attorneys appointed by the state bar board of commissioners, and two laypersons and three attorneys appointed by the Supreme Court. M.C.R. 9.105; 9.110(B). The primary responsibility of the Board is to investigate and discipline attorneys suspected of misconduct. M.C.R. 9.105.



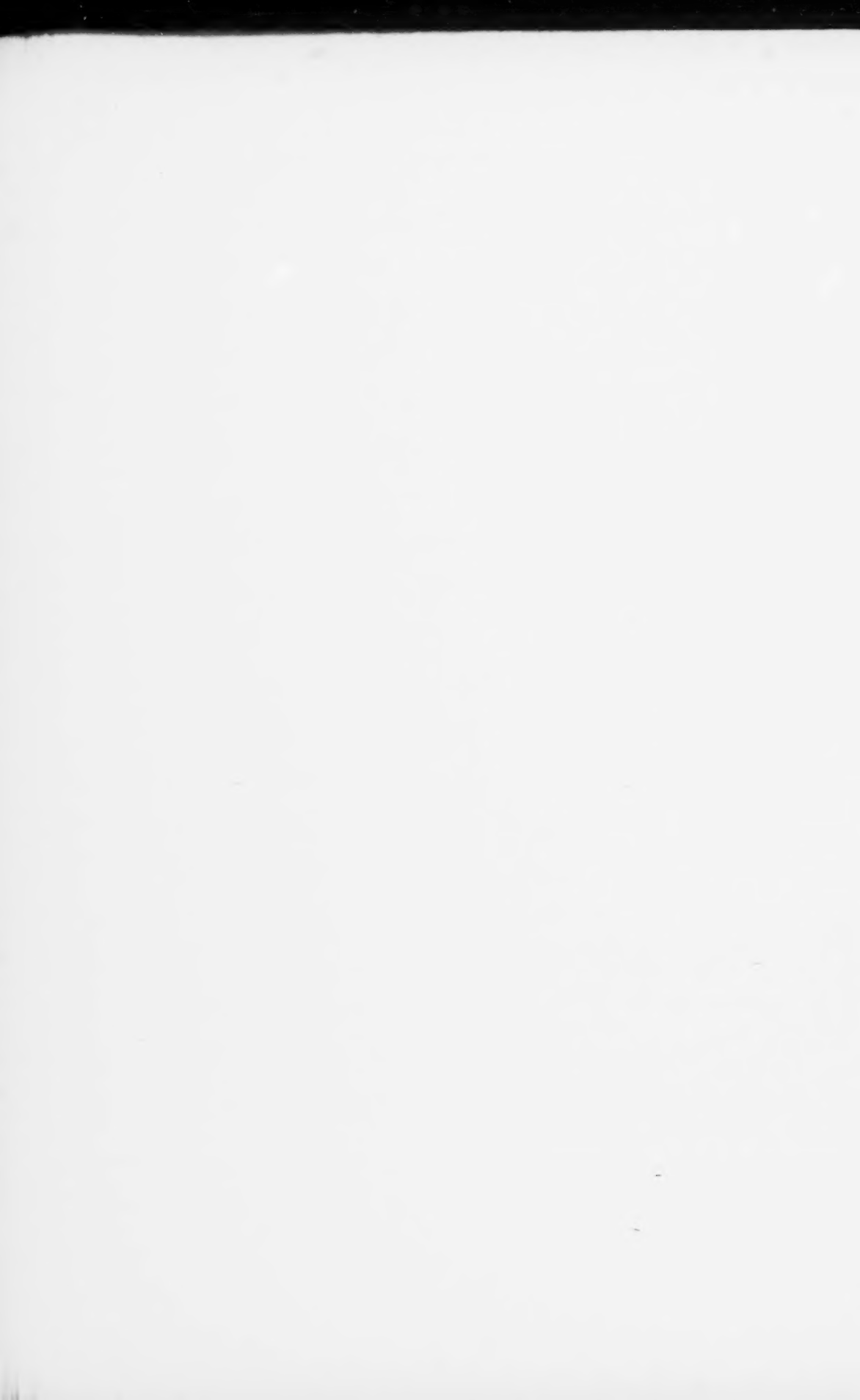
The Board's investigatory needs are served by the Attorney Grievance Commission which supervises and approves inquiries into alleged attorney malfeasance. M.C.R. 9.108(D)(2); 9.109(A)(5). The Commission is appointed in the same manner as the Board, and in turn, appoints one of its attorney members to the position of Grievance Administrator. The Grievance Administrator is the individual upon whom the burden of investigation finally rests. M.C.R. 9.109(A)(5). The Grievance Administrator may ask the Commission to exercise its subpoena powers to facilitate his inquiry; persons failing to comply with a Commission subpoena may be held in contempt. M.C.R. 9.114(C).

Where the Grievance Administrator's investigation has yielded probable cause to suspect misconduct, the

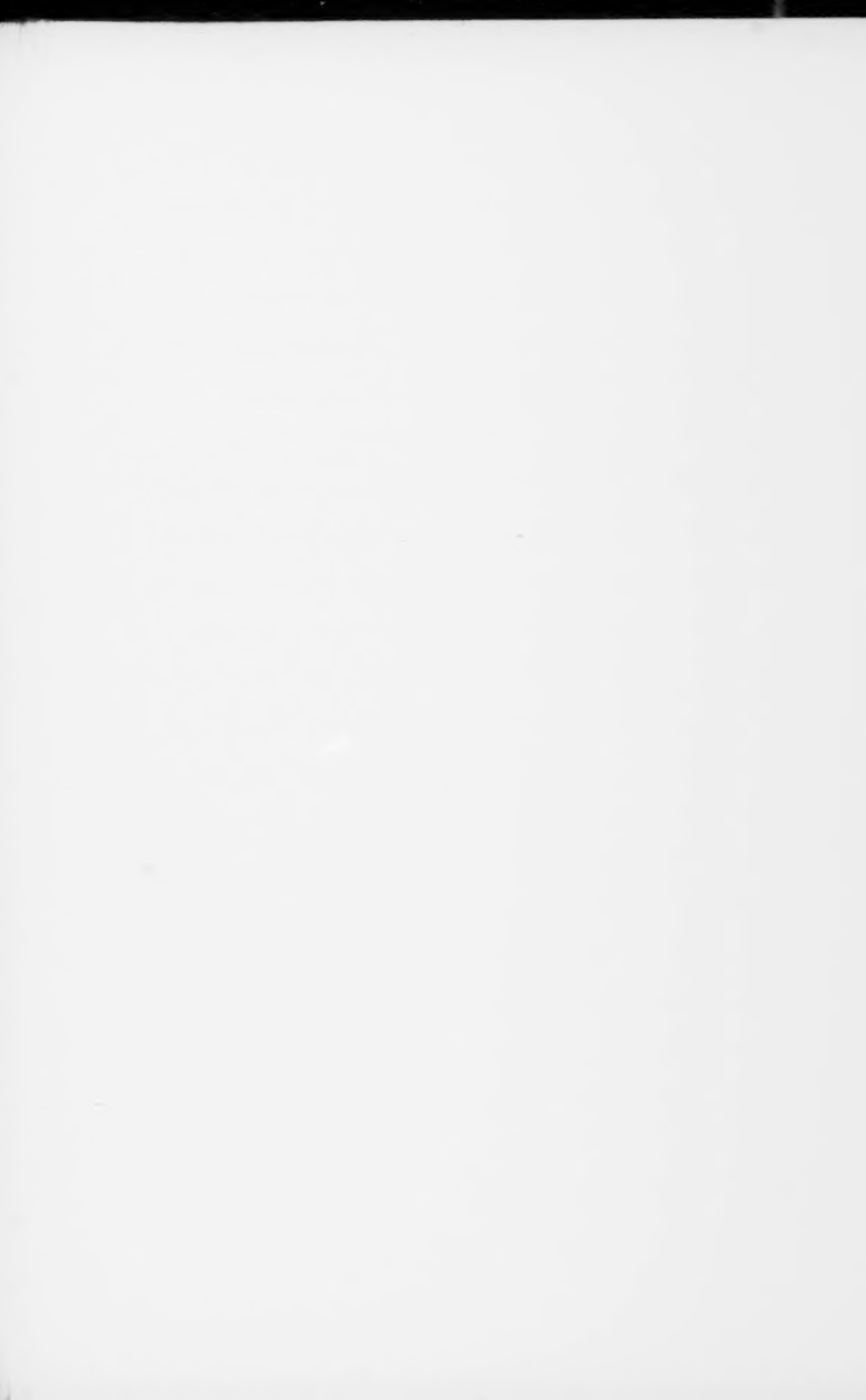


Commission may authorize prosecution before the Board. M.C.R. 9.109(6). That prosecution may culminate in a disciplinary hearing before a three attorney panel appointed by the Board. M.C.R. 9.111. The actions of that panel are reviewable by the full Board. M.C.R. 9.110(D)(5). The Board's decision may be reviewed at the discretion of the Michigan Supreme Court. M.C.R. 9.122(A). There is no statutory authority for this review under Michigan law, and one Michigan federal district judge has found that leave to appeal is rarely granted. Electronic Surveillance, 596 F. Supp. at 999. That finding has not been disputed in the present case.

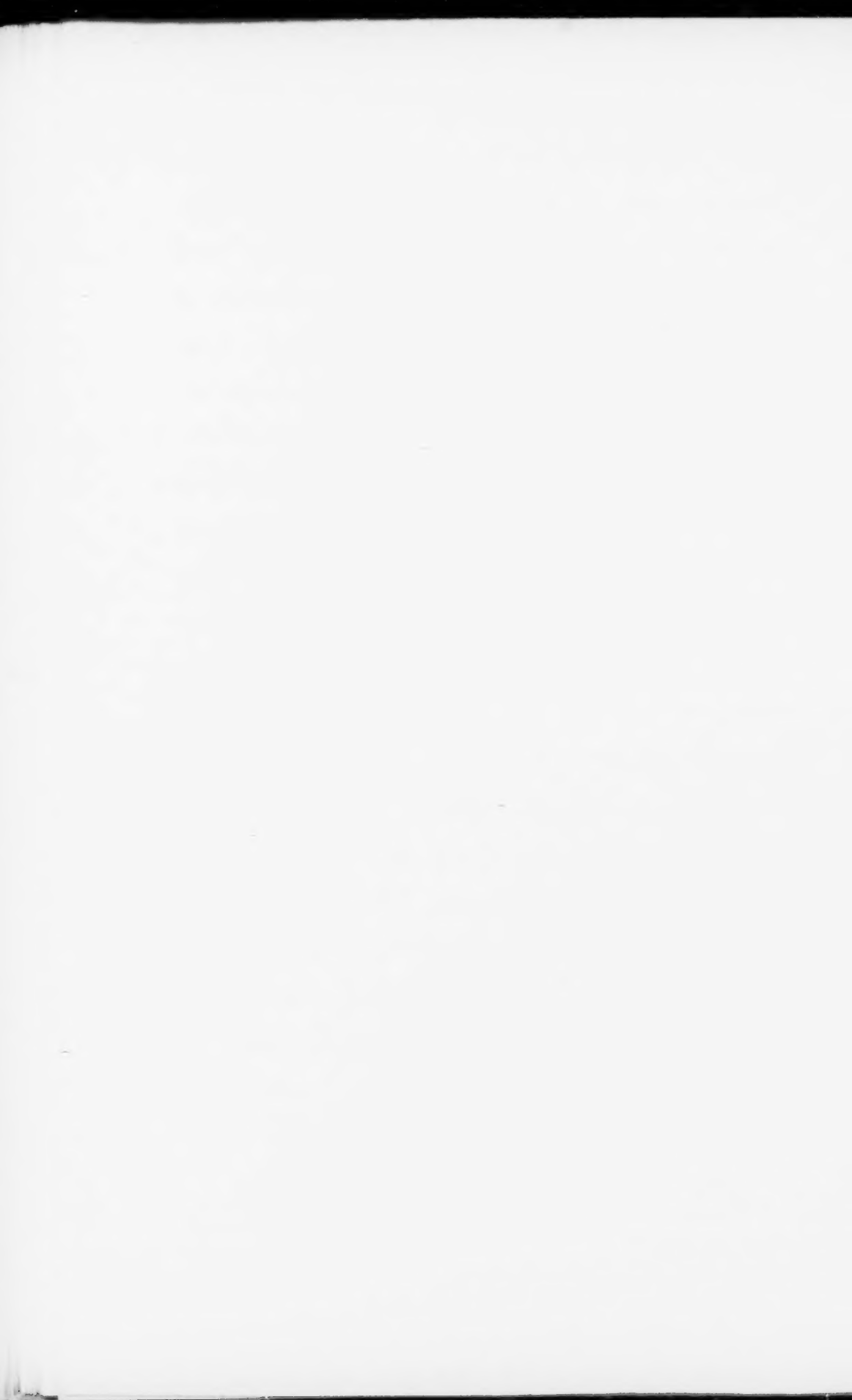
This administrative structure of the Michigan disciplinary scheme certainly distinguishes this case from others that have premitted the disclosure of grand



jury evidence to state bar officials investigating complaints of attorney malfeasance. In the Matter of Federal Grand Jury Proceedings (United States v. Doe), 760 F.2d at 436; In re Barker, 741 F.2d at 250; United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980); In the matter of Disclosure of Testimony Before the Grand Jury, 580 F.2d at 281. In each of these cases, the judicial role in the proceedings was so substantial and clearly defined by state statute as to be properly characterized as preliminary to a judicial proceeding. In the case before us, the Michigan Supreme Court itself has said these "disciplinary procedures are, prior to final review by this Court, administrative and quasi-judicial in nature, rather than primarily judicial." State Bar v. Estes, 390 Mich. 585, 592, 212 N.W.2d 903, 905 (1973).



For example, In the Matter of Federal Grand Jury Proceedings (United States v. Doe), 760 F.2d at 436, the Second Circuit reconsidered its conclusion in Doe v. Rosenberry, 255 F.2d at 118, that disclosure of grand jury evidence to New York bar investigators was permissible under 6(e)(3)(C)(i) in light of Baggot, 463 U.S. at 480. The Court concluded that Baggot did not affect its prior holdings because the New York disciplinary investigations offered more than simple judicial review of agency actions; those investigations are ordered by, and upon a showing of probable cause, heard by the Appellate Division of the New York Supreme Court. See also Sobotka, 623 F.2d at 764 (disclosure of grand jury material to Connecticut Grievance Committee permissible where disciplinary proceedings



are carried out before Connecticut Superior Court).

In In the Matter of Disclosure of Testimony Before the Grand Jury, 580 F.2d at 281, the Eighth Circuit upheld a district court's ruling that disclosure of grand jury materials to the Counsel on Discipline of the Nebraska State Bar Association was authorized as preliminary to a judicial proceeding. See United States v. Salanitro, 437 F. Supp. 240 (Neb. 1977), aff'd sub nom. In the matter of Disclosure of Testimony Before the Grand Jury, 580 F.2d at 281. The court paid particular attention to the operation of the Nebraska disciplinary statute. Under Nebraska law, allegations of misconduct are investigated by the Counsel to the bar association. If evidence warrants, a hearing is held before the Nebraska Supreme Court which itself



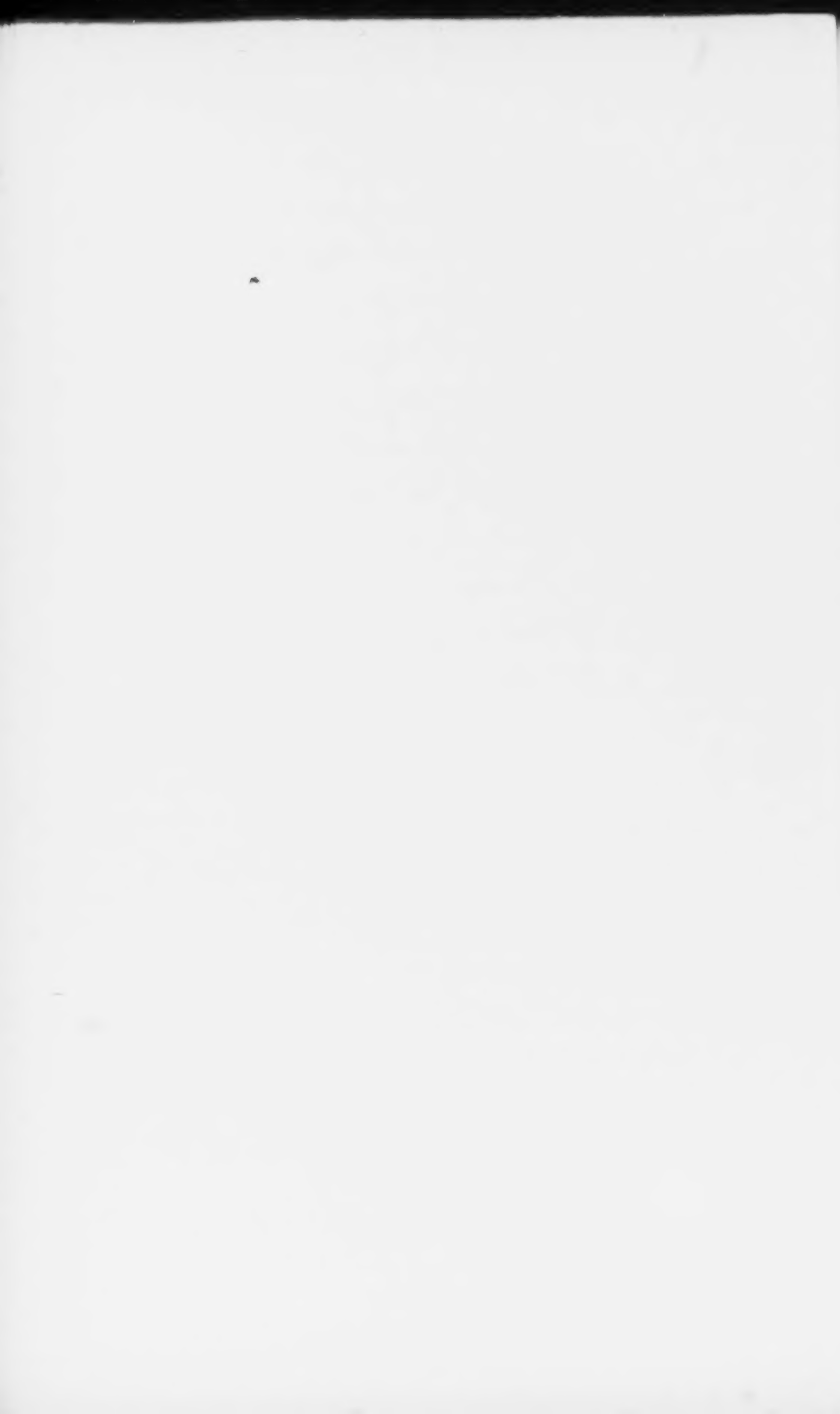
determines whether an attorney is guilty of misconduct, and what penalty, if any, should be imposed. Salanitro, 437 F. Supp. at 243. The court concluded these procedures for "disciplining attorneys ... were designed to culminate in a judicial proceeding and, therefore, all the requests of the applicants were 'preliminarily to or in connection with a judicial proceeding.'

In the Matter of Disclosure of Testimony Before the Grand Jury,
580 F.2d at 286.

Despite the direct involvement of the Nebraska Supreme Court in any actual disciplinary hearing, another panel of the Eighth Circuit later questioned whether the holding of In the Matter of Disclosure of Testimony Before the Grand Jury, was overly expansive. In refusing to extend the logic of In the Matter of Disclosure



of Testimony Before the Grand Jury to parole revocation hearings which might be subject to judicial review upon a proper showing, the court stated, "[s]uch a reading of the Rule invites indiscriminate disclosure of grand jury materials to a wide variety of agencies whose decisions are subject to judicial review." Bradley v. Fairfax, 634 F.2d at 1129. We find both In the Matter of Disclosure of Testimony Before the Grand Jury and Bradley to be fully consistent with our present holding. We agree with the Bradley court that any disclosure predicated simply on the automatic review of agency action by a judicial body is unwarranted under the Rule. However, we agree that In the Matter of Disclosure of Testimony Before the Grand Jury is consistent with the Supreme Court's later



decision in Baggot because the disciplinary scheme reviewed evidenced such a substantial judicial involvement as to support a finding that disclosure was directed preliminarily to a judicial proceeding.

The Ninth Circuit addressed the 6(e)(3)(C)(i) disclosure issue in In Re Barker, 741 F.2d at 251. In that case, Oregon bar officials sought grand jury materials gathered in the investigation of the investment activities of two large regional banks which might implicate an Oregon attorney. Under the Oregon attorney discipline statute, formal charges of misconduct are heard before a Disciplinary Board appointed by the Supreme Court of Oregon. Ore. Rev. Stat. ch. 9.543(1). The Oregon Supreme Court administrator is advised of the Board's decision by written opinion. Should the

Board find the accused has not committed any misconduct, or if the imposed penalty does not exceed 60 days of suspension from the practice of law, either party may request automatic de novo review by the supreme court Id. at 9.536(1). Should disbarment, or a suspension of more than 60 days, result, de novo review by the Supreme Court is carried out without request. Id. at 9.536(2). Stating that, "the only way for the Oregon State Bar to institute such proceedings is to resort to the quasi-judicial proceedings before the Supreme Court of Oregon. The primary purpose of the disclosure sought is to assist in the preparation of the proceedings before the Oregon Supreme Court[,]" the court determined that the provisions providing for automatic de novo judicial review satisfied the requirements of (C)(i) as interpreted by Baggot.

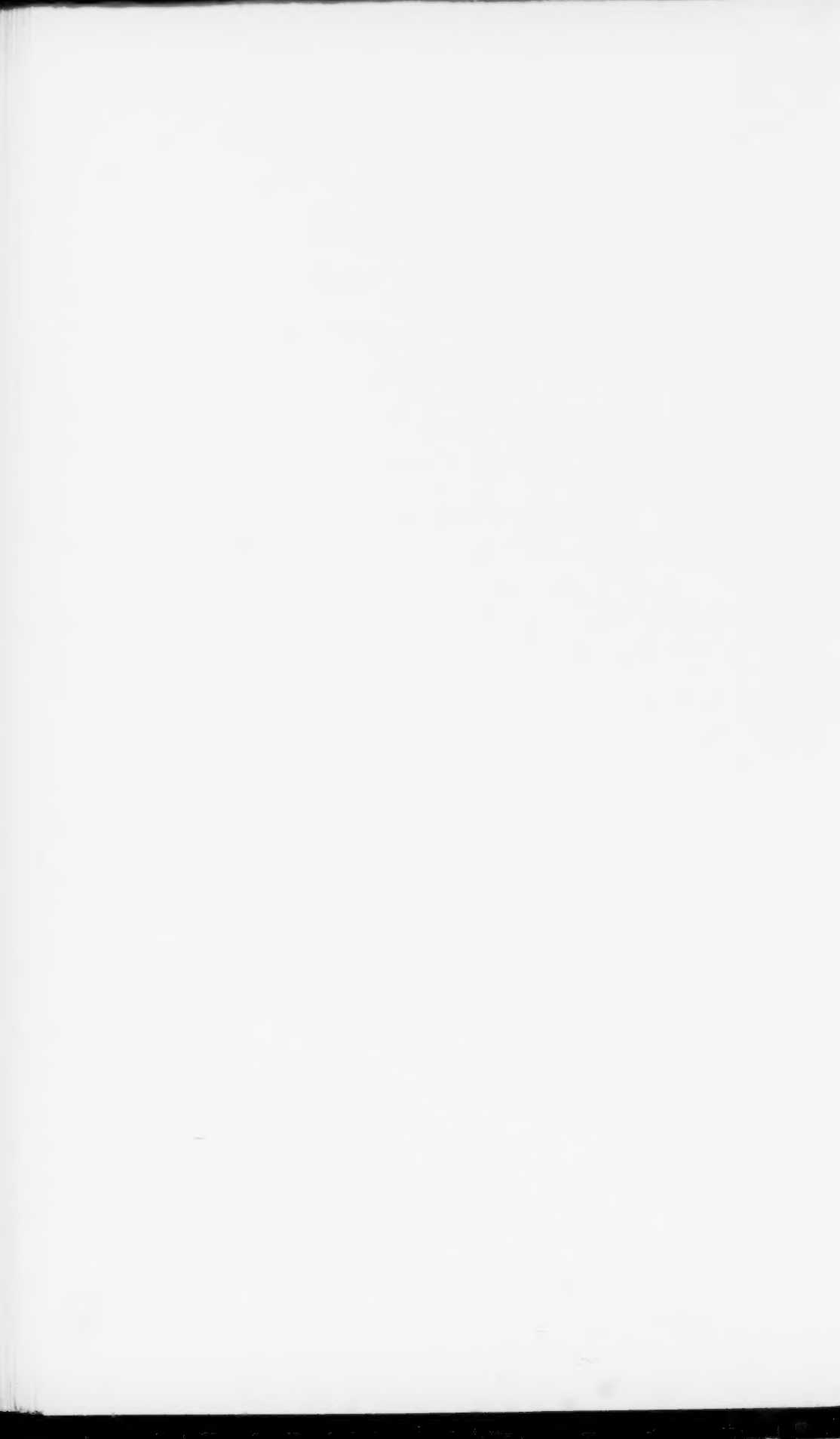
In the case before us, the district court relied on In the Matter of Electronic Surveillance, 596 F. Supp. at



999, to find the attorney discipline procedures in Michigan to be sufficiently analogous to those cases previously mentioned to permit the disclosure of federal grand jury materials to state bar officials. Under past precedent in our circuit this decision would have been entitled to great weight and deference because there is no Michigan case interpreting the nature of the disciplinary procedure except the reference to the quasi-judicial aspects of the proceedings in State Bar v. Estes, Supra. In such circumstances we would have been bound to give to the district court great deference and would not have been in a position to review unless there was a clear error of law. See, e.g., Martin v. Joseph Harris Co. Inc., 767 F.2d 296, 299 (6th Cir.1985), School District for the City of Royal Oak v. Continental

Casualty Co., 912 F.2d 844, 845 (6th Cir. 1990). However, these cases and others were overruled in Salve Regina College v. Russell, __ U.S.__ (1991) (4219 U.S. Law Week 3-20-91). Appellate deference to the district court's state law determination was found to be inconsistent with Erie R. Co. v. Tompkins, 304 U.S. 64. We now consider these questions on appellate review independent of the district court's holding.

On the record here we find the Michigan attorney discipline procedures do not evidence a substantial judicial role in the proceedings. We are not prepared to call an administrative hearing before a panel of private attorneys and laypersons, funded by a private organization, with limited discretionary review to the Michigan Supreme Court, a "judicial proceeding" within the meaning of Rule



6(e)(3)(C)(i). That the disciplinary proceedings are sanctioned under the authority of the state supreme court is irrelevant. No amount of artificial judicial procedure of due process can transform such an administrative panel into a judicial body within the meaning of the Rule. "The Commission does not seek the grand jury evidence for use in any judicial proceeding; it seeks a private disclosure in aid of an administrative investigation into possible violations... The investigation undertaken is preliminary to and in connection with the ex parte administrative proceeding contemplated by the statute; it is not preliminary to or in connection with a judicial proceeding with the intendment of the rule." In Re Grand Jury Proceedings, 309 F.2d at 443-44 (denying Federal Trade Commission's request for disclosure of



grand jury materials to facilitate an anti-trust investigation). Having chosen a non-judicial forum for attorney discipline, Michigan can not now complain when access to the federal grand jury is denied. Accordingly, we find In the Matter of Electronic Surveillance, 596 F.Supp. at 991, to be incorrectly decided.

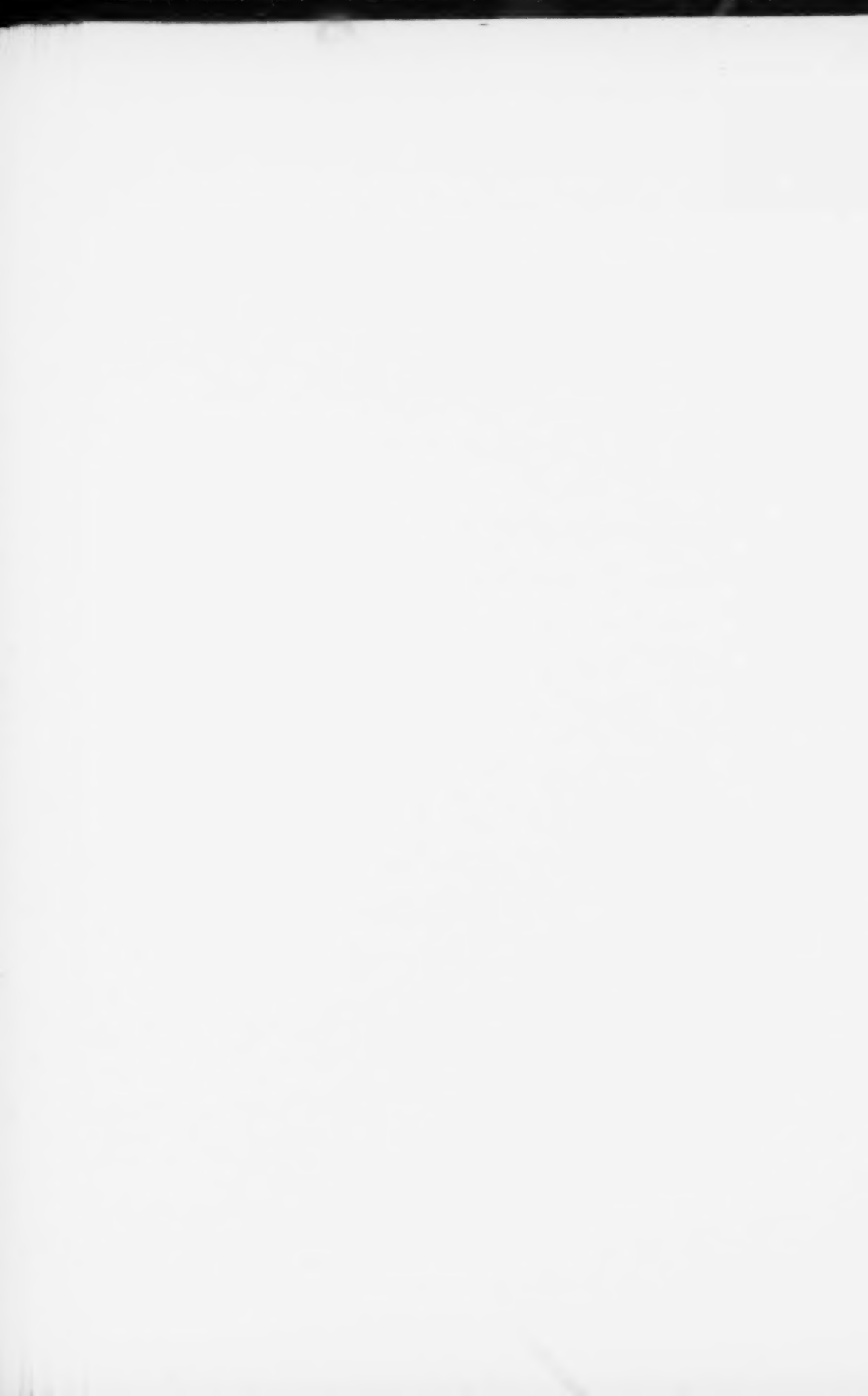
Were the Michigan Supreme Court to grant mandatory review in each case so as to provide an independent inquiry into each case of discipline or disbarment, we might be faced with a different situation. However, such is not case here. That is not to say that an appeal as of right, in and of itself, would transform this administrative hearing into a judicial proceeding, particularly in light of Baggot; for we agree with the Eighth Circuit that predicated disclosure solely



upon statutory provisions providing for automatic review risks the exposure of grand jury materials to a number of administrative agencies not contemplated under Rule 6(e)(3)(C)(i).

Bradley v. Fairfax, 634 F.2d at 1129, n.6.

The Commission argues that disclosure is proper despite the administrative nature of the contemplated disciplinary proceedings because of the public interest in the integrity of the state bar. Though dicta in some cases suggests that attorney discipline proceedings are themselves judicial in nature by virtue of the special relationship between the court and those attorneys privileged to practice before it, United States v. Bates, 627 F.2d at 351 (denying disclosure of grand jury material to the Federal Maritime Commission); In Re J. Ray McDermott & Co.,

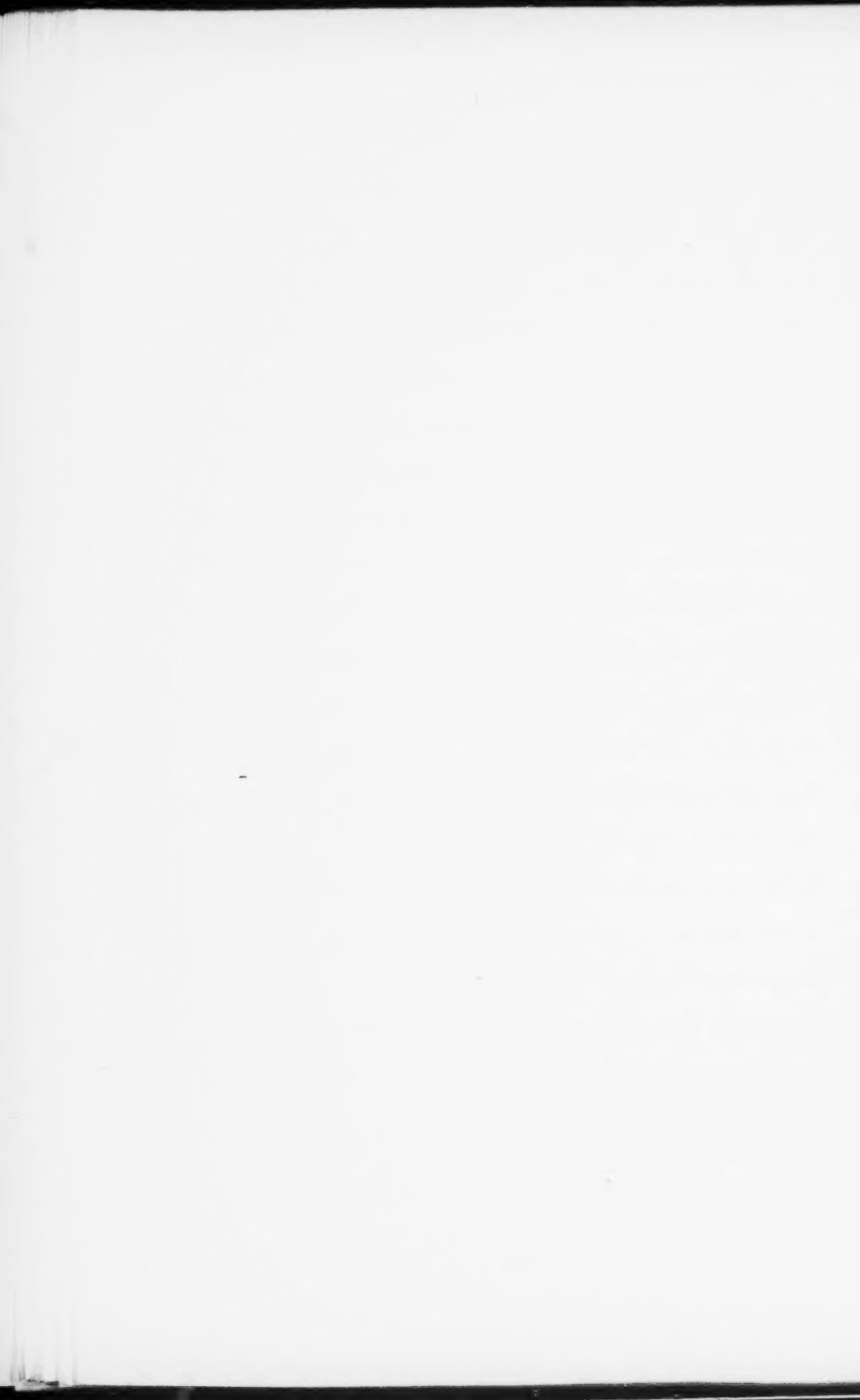


Inc., 622 F.2d at 170 (denying disclosure of grand jury material to the Federal Energy Regulatory Commission), "[c]ertainly the notion that bar disciplinary committee investigations are any more judicial proceedings than are agency investigations appears to be little more than a convenient legal fiction." Note, 80 Mich. L. Rev. at 1670, n.22. As noble as the regulation of, and the protection of the public generally from, those who are unscrupulous and also practice law may be, the federal grand jury cannot be the vehicle of investigation where that regulation is non-judicial. The constitutional protection afforded by the secrecy of the grand jury is far more important, particularly in a case such as this one where the Commission holds the unused power to subpoena witnesses to gather its



own evidence to protect the public.

The Commission cites Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) for the proposition that certain administrative hearings in the public interest may rise to the level of a judicial proceeding where the concepts of fundamental fairness are followed. In Conlisk, the court found the disclosure of grand jury materials to the Superintendent of Police in an investigation of the Chicago police department was ordered preliminarily to a judicial proceeding. Id. at 897. We find the Commission's argument to be in error as the Conlisk court clearly articulated the grounds for its decision: "The statutory scheme involved here plainly contemplates judicial review of the board's findings, and we must therefore conclude, in answering the first question,



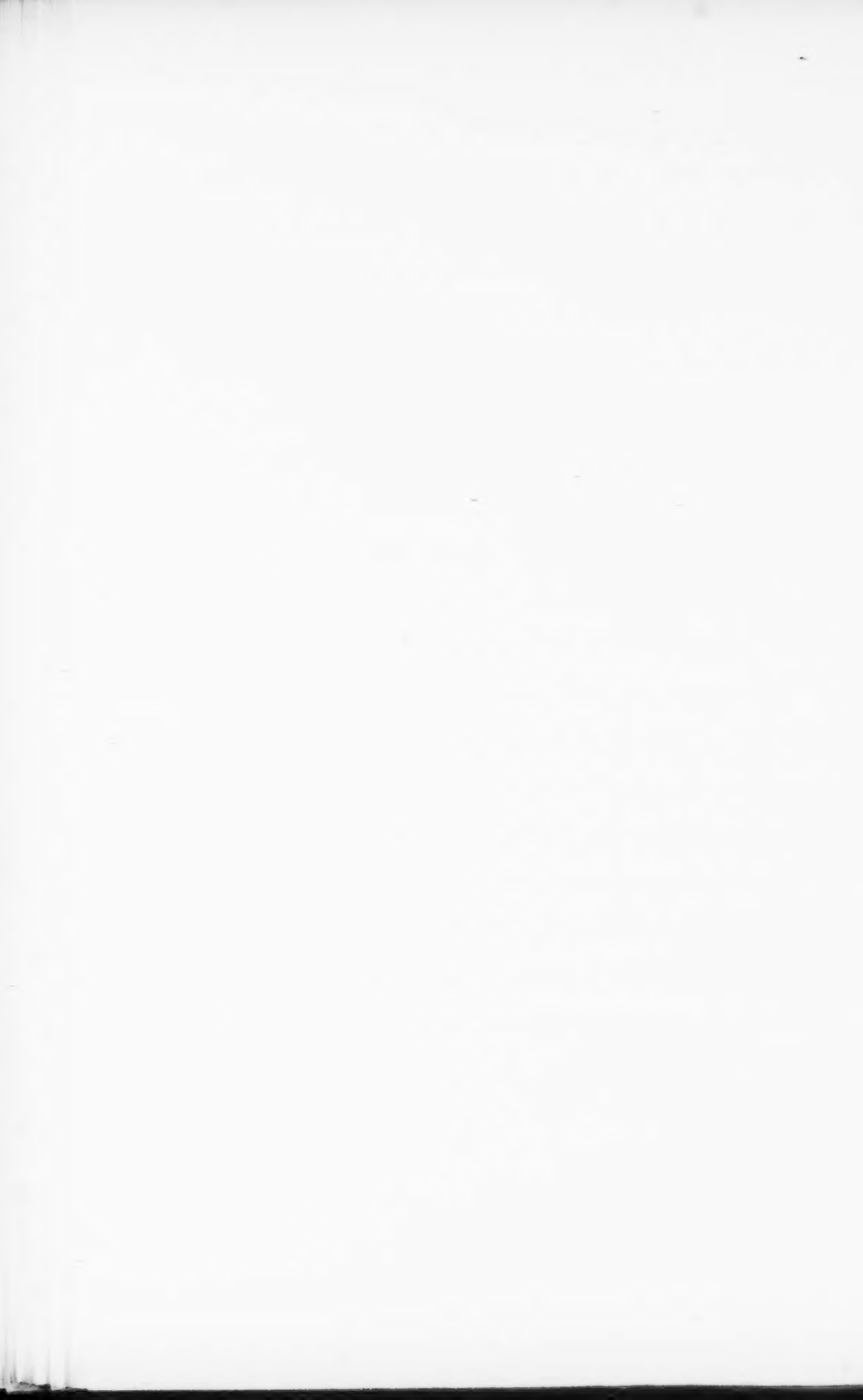
that the police board hearing is 'preliminary' to judicial review." Id.; see also Note, 70 Va. L. Rev. at 1639. although we question the validity of the Conlisk reasoning following Baggot, we note that the court's statements do not support the Commission's argument.

This case presents the tension between the pressure to insure that those who practice law are appropriately regulated and the need to adequately protect the secrecy of grand jury proceedings. States may choose to regulate the practice of law in basically any manner they wish. They may regulate that practice by action of a judicial body or they may use an administrative body as Michigan has done. Within the borders of the state, that regulation is, of course, appropriate so long as no federal constitutional rights are abridged.



However, having chosen an administrative scheme to regulate the practice of law, Michigan has curtailed its access to grand jury materials because as an administrative body with only discretionary review by the state supreme court, the Commission falls within the same category as do all administrative agencies which are denied access to federal grand jury material under Rule 6(e)(3)(C)(i), even though the Commission's purview includes the regulation of the right to practice law.

We are not unaware of those commentators who have urged the courts to make grand jury materials more accessible to administrative agencies in an effort to reduce duplicative investigations. See, e.g., Note, 80 Mich. L. Rev. at 1672. However, Rule 6(e)(3)(C)(i) is not a rule



of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule. Accordingly, we find disclosure to the commission is not ordered "preliminarily to or in connection with a judicial proceeding" within the limited secrecy exception provided by Rule 6(e)(3)(C)(i).

II. PARTICULARIZED NEED

Because we find that disclosure to the commission is not preliminary to a judicial proceeding, we need not address the second prong of Rule 6(e)(3)(C)(i) disclosure, particularized need. We do note, however, that the district court's conclusion as to the degree of need the



Commission is required to show is inconsistent with our recent holding in Federal Deposit Insurance Corp. v. Ernst & Whinney, 921 F.2d at 86. The district court predicated the disclosure of all information that might possibly relate to potential attorney misconduct on the ground that the Commission must be permitted to

seek out and then discipline[] any attorneys who have violated the Michigan Rules of Professional Conduct. Allegations of significant misconduct on behalf of judges and/or lawyers of this state go directly to the integrity of the courts and the bar. The need to thoroughly investigate these accusations and thus restore public confidence in public officials is sufficient to satisfy the requirement of a compelling and particularized need. Furthermore, this Court finds that the requests for disclosure are as narrow and structured as possible, since the requests only deal with material



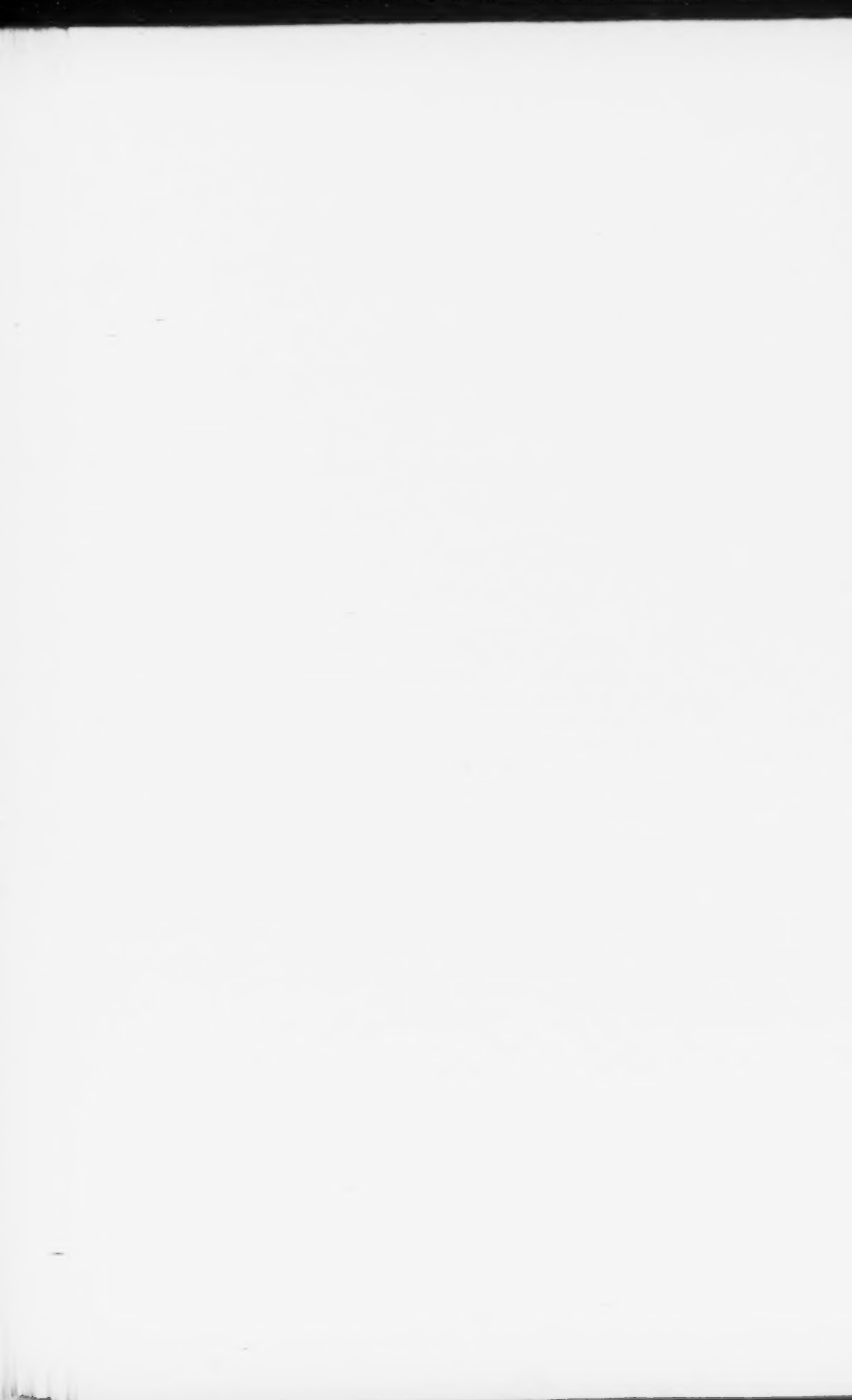
that concerns potential wrongdoing by a judge and attorneys.

In light of these factors, this Court finds that the need for disclosure in this instance out-weighs the need for continued secrecy.

Such a finding is insufficient. In Ernst & Whinney we explicitly stated that the burden of establishing particularized need is necessarily heavy in order to protect the secrecy of the grand jury.

The fact that the grand jury documents are relevant or that production of them by the [Commission] would expedite civil discovery or reduce expenses for the parties is insufficient to show particularized need when the evidence can be obtained through ordinary discovery, i.e., subpoenaing the documents from other sources, or pursuing other routine avenues of investigation.

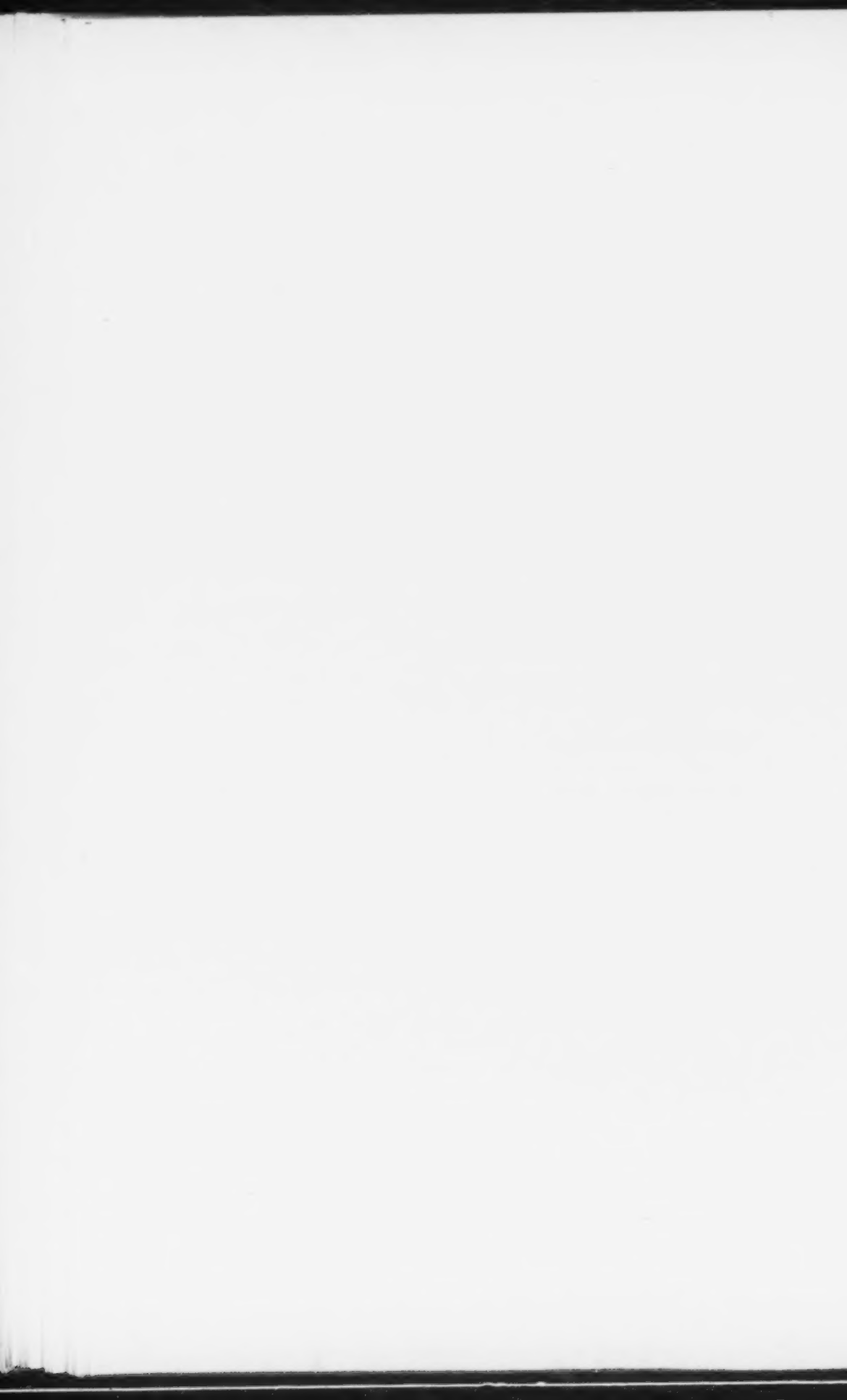
Ernst & Whinney, 921 F.2d at 86-87 (citations omitted). Though we agree that the public holds a substantial interest in



the integrity of the state bar, that interest per se will not justify the disclosure ordered here. See Sobotka, 623 F.2d at 768. Our holding in Ernst & Whinney requires a movant to demonstrate the need for disclosure with particularity so that the secrecy of the proceedings may be lifted only to the extent necessary to fulfill a narrowly tailored and compelling need. Ernst & Whinney, 921 F.2d at 86.

Accordingly, the judgment of the district court is REVERSED and REMANDED for further action not inconsistent with this opinion. WELLFORD, Senior Circuit Judge, concurring:

I am in accord with most of Judge Martin's carefully reasoned opinion in this case. I find it unnecessary to the decision in this case, however, to discuss an issue not before us. The opinion takes



great pains to point out that "[t]here is no statutory authority for [automatic] review under Michigan law...[and] leave to appeal is rarely granted."¹ Further, the majority observes:

This administrative structure of the Michigan disciplinary scheme certainly distinguishes this case from others that have permitted the disclosure of grand jury evidence to state bar officials investigating complaints of attorney [or judicial] misfeasance.

In light of this emphasis that because Michigan court review of attorney

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Actually the district court stated that "the Michigan Supreme Court seldom grants leave to appeal the Board's decisions." 596 F. Supp. 991, 999 (E.D. Mich. 1984). That was in 1984 and we should not presume that because the court did not frequently grant review in disciplinary proceedings in 1984 it still did not do so but on seldom occasions in 1990.

or judicial disciplinary matters is discretionary and "rare" that Rule 6(e)(3)(C)(i) of Fed. R. Crim. P. disclosure is not to be invoked, I would eliminate any reference to what purports to be the principle enunciated in Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980), "that any disclosure predicated simply on the automatic review of agency action by a judicial body is unwarranted." (Emphasis added).

Bradley involved action of the United State Parole Commission, one entirely different from the matter with which we are here concerned, and it conceded that "[t]his Circuit [Eighth Circuit] and others have on occasion read the phrase 'judicial proceeding' expansively." Id. at 1129. I am not sure that Bradley stands for the principle for

which it is cited, and, as stated, that proposition is dictum in this case. The Eighth Circuit, in an earlier opinion, held by the majority to be "fully consistent" with its holding, allowed disclosure under the rule in question of grand jury material related to investigation of a Nebraska prosecuting attorney and judges. See Matter of Disclosure of Testimony, Etc., 580 F.2d 281 (8th Cir. 1978). I am satisfied that an appeal of right to the Michigan courts, if the law provided for it, would make disclosure appropriate as being "in connection with a judicial proceeding."

The en banc district court in Nebraska permitted disclosure of limited grand jury material and "the names and addresses of those persons who gave testimony" before a grand jury concerning

wrongdoing of the attorney and judges involved by the Nebraska investigatory body. This action was affirmed in Matter of Disclosure of Testimony, Etc., supra, which provided that this list of names and addresses be kept "as fully confidential as possible" by the investigatory body. I would similarly be disposed in this case to permit such a list of names and addresses of grand jury witnesses (but not their testimony) to be furnished the Michigan Attorney Grievance Commission on a strictly confidential basis. Further, if a particularized need for grand jury testimony of a witness or witnesses were later established by that body, I would make it clear that our present decision not to permit disclosure would constitute no bar to a future application after unsuccessfully "pursuing other routine

avenues of investigation."² Federal Deposit Ins. Corp. v. Ernst & Whinney, 921 F.2d 83, 87 (6th Cir. 1990), citing United States v. Sells Engineering, 463 U.S. 418, 431 (1983).

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"Under the Michigan Constitution, the Michigan Supreme Court is charged with the exclusive responsibility of supervising Michigan lawyers." Michigan Lawyer Discipline, Journal of Urban Law (U. of Detroit), Vol. 61, p. 4 (1983) (emphasis added). "The Grievance Administrator, the complainant, or the respondent may seek leave to appeal to the Supreme Court." Id. at 21.



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-2219

In re: GRAND JURY 89-4-72

JOHN DOE #1

Petitioner - Appellant

V.

UNITED STATES OF AMERICA;

Respondent - Appellee

MICHIGAN JUDICIAL TENURE COMMISSION;
STATE OF MICHIGAN ATTORNEY GRIEVANCE
COMMISSION, Michigan Attorney Grievance
Commission

Movants - Appellees

Before: MARTIN, and MILBURN, Circuit
Judges;

WELLFORD, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States
District Court for the Eastern District
of Michigan at Detroit.

THIS CAUSE was heard on the
record from the district court and was
argued by counsel.

ON CONSIDERATION WHEREOF, it is
ordered that the judgment of the district
court is reversed and the case is
remanded for further action not
inconsistent with the opinion.



THE COURT

ENTERED BY ORDER OF

Leonard Green, Clerk

Issued as Mandate:

A True Copy.

COSTS:

Attest:

Filing Fee.....\$

Printing.....\$

Total.....\$

Deputy Clerk

No.
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: GRAND JURY
89-4-72

)

O R D E R

JOHN DOE #1,
Petitioner-Appellant, V.

UNITED STATES OF AMERICA,
Respondent-Appellee,

MICHIGAN JUDICIAL TENURE COMMISSION;
MICHIGAN ATTORNEY GRIEVANCE COMMISSION,

Movants-Appellees

BEFORE: MARTIN and MILBURN, Circuit
Judges; and WELLFORD, Senior Circuit
Judge.

The court having received a
petition for rehearing en banc, and the
petition having been circulated not only
to the original panel members but also to
all other active judges of this court, and
no judge of this court having requested a
vote on the suggestion for rehearing en
banc, the petition for rehearing has been



referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

No. 90-2219

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: GRAND JURY 89-4-72)
JOHN DOE #1,)
Petitioner-Appellant,)
)
V.)
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee,)
)
MICHIGAN JUDICIAL TENURE COMMISSION;)
MICHIGAN ATTORNEY GRIEVANCE COMMISSION,))
)
Movants-Appellees)
)



BEFORE: MARTIN AND MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

FEDERAL RULES OF CRIMINAL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE
III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(e) Recording and Disclosure of Proceedings.

(2) General Rule of Secrecy. A grand juror an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

UNITED STATES CODE OF PROVISIONS



UNITED STATES CODE

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART IV -- JURISDICTION AND VENUE

Section 1254. Court of appeals;
certiorari; appeal; certified questions.

Cases in the courts of appeals
may be reviewed by the Supreme Court by
the following methods:

(1) By writ of certiorari
granted upon the petition of any
party to any civil or criminal
case, before or after rendition
of judgement or decree;

Section 1331. Federal question



The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

MICHIGAN RULES OF COURT
1991

MICHIGAN RULES OF COURT

1991

CHAPTER 7. APPELLATE RULES

SUBCHAPTER 7.300 SUPREME COURT

RULE 7.301 JURISDICTION AND TERM

(A) Jurisdiction. The Supreme Court may:

(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(6) exercise superintending control over a lower court or tribunal (see, e.g., MCR 7.304);

RULE 7.304 ORIGINAL PROCEEDINGS

(A) When Available. A complaint may be filed in the Supreme Court to implement the Court's superintending control power when an application for leave to appeal cannot be filed. A complaint for mandamus may be filed to



implement the Court's superintending control power over the Board of Law Examiners, the Attorney Discipline Board, or the Attorney Grievance Commission.

(C) Answer.

(2) The grievance administrator's answer to a complaint for mandamus against the Attorney Grievance Commission must show the investigatory steps taken and other pertinent information; the grievance administrator shall certify to the clerk all other matters in his or her possession deemed confidential under MCR 9.126. The protection provided by MCR 9.126 continues, unless the Court otherwise orders.

CHAPTER 9. PROFESSIONAL DISCIPLINARY PROCEEDINGS

SUBCHAPTER 9.100 ATTORNEY GRIEVANCE COMMISSION; ATTORNEY DISCIPLINE BOARD



CHAPTER 9. PROFESSIONAL
DISCIPLINARY PROCEEDINGS

SUBCHAPTER 9.100
ATTORNEY GRIEVANCE COMMISSION;
ATTORNEY DISCIPLINE BOARD

RULE 9.103 STANDARDS
OF CONDUCT FOR ATTORNEYS

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules



of judicial conduct that are adopted by the Supreme Court.

(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar.

(C) Duty to Assist Administrator. An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.

**RULE 9.104 GROUNDS FOR DISCIPLINE IN
GENERAL; ADJUDICATION ELSEWHERE**

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not



occurring in the course of an attorney-client relationship:

(4) conduct that violates the standards or rules or professional responsibility adopted the Supreme Court;

**RULE 9.105 PURPOSE AND FUNDING
OF DISCIPLINARY PROCEEDINGS**

Discipline for misconduct is not intended as punishment for wrongdoing, but the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator. Commissioners of the State

Bar of Michigan and other attorneys who are associated with the commissioner in the practice of law may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.*

*Pub. Note: The Order which amended this Rule effective July 27, 1990 provided that "...the rule of disqualification in amended MCR 9.105 shall not apply until April 1, 1991 to disciplinary cases in which attorneys who would be affected by the amended rule were retained by respondents prior to the effective date of these amendments."

**RULE 9.106 TYPES OF DISCIPLINE; MINIMUM
DISCIPLINE; ADMONISHMENT**

Misconduct is grounds for:



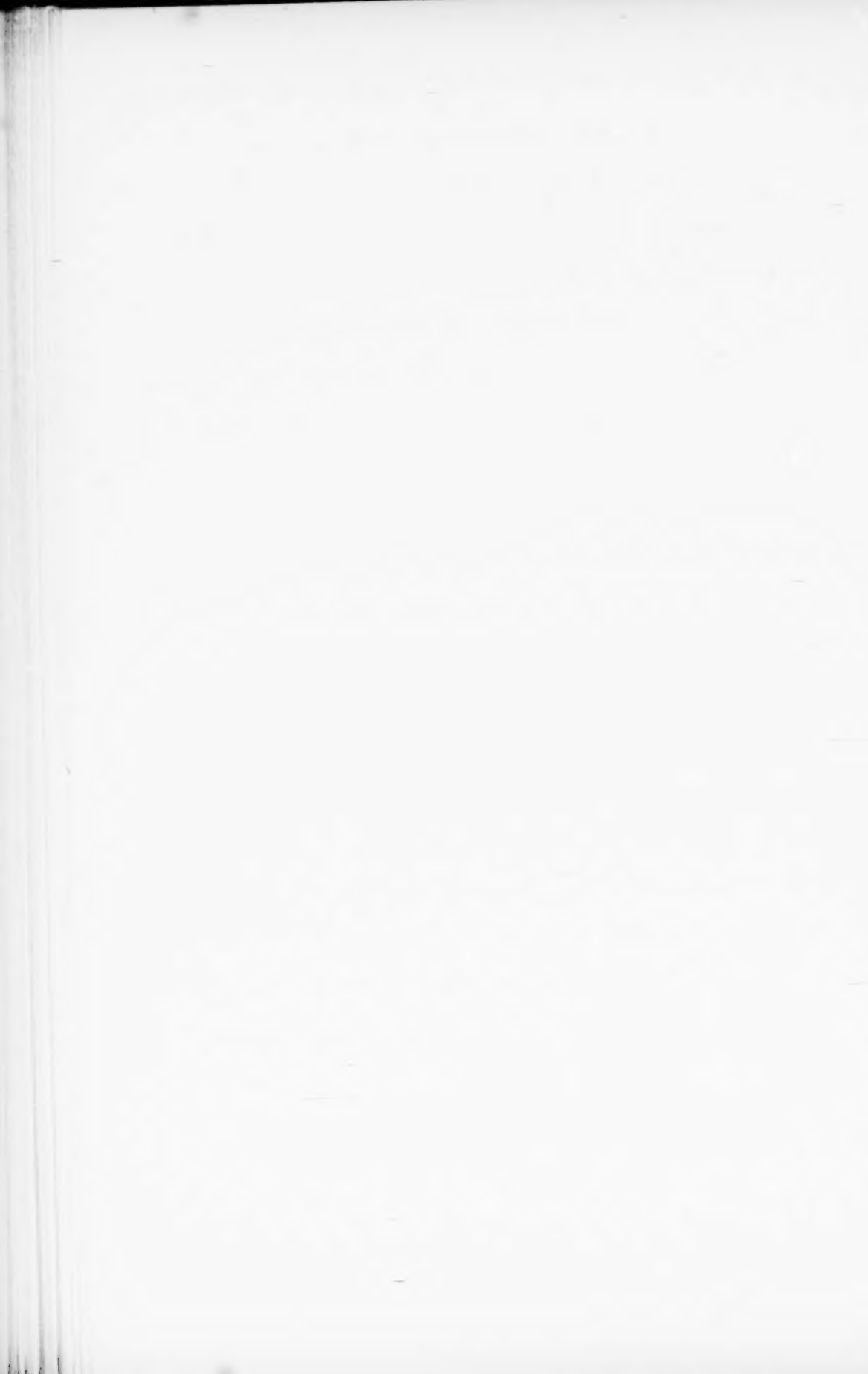
(1) revocation of the license to practice law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C);

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an



order of discipline;

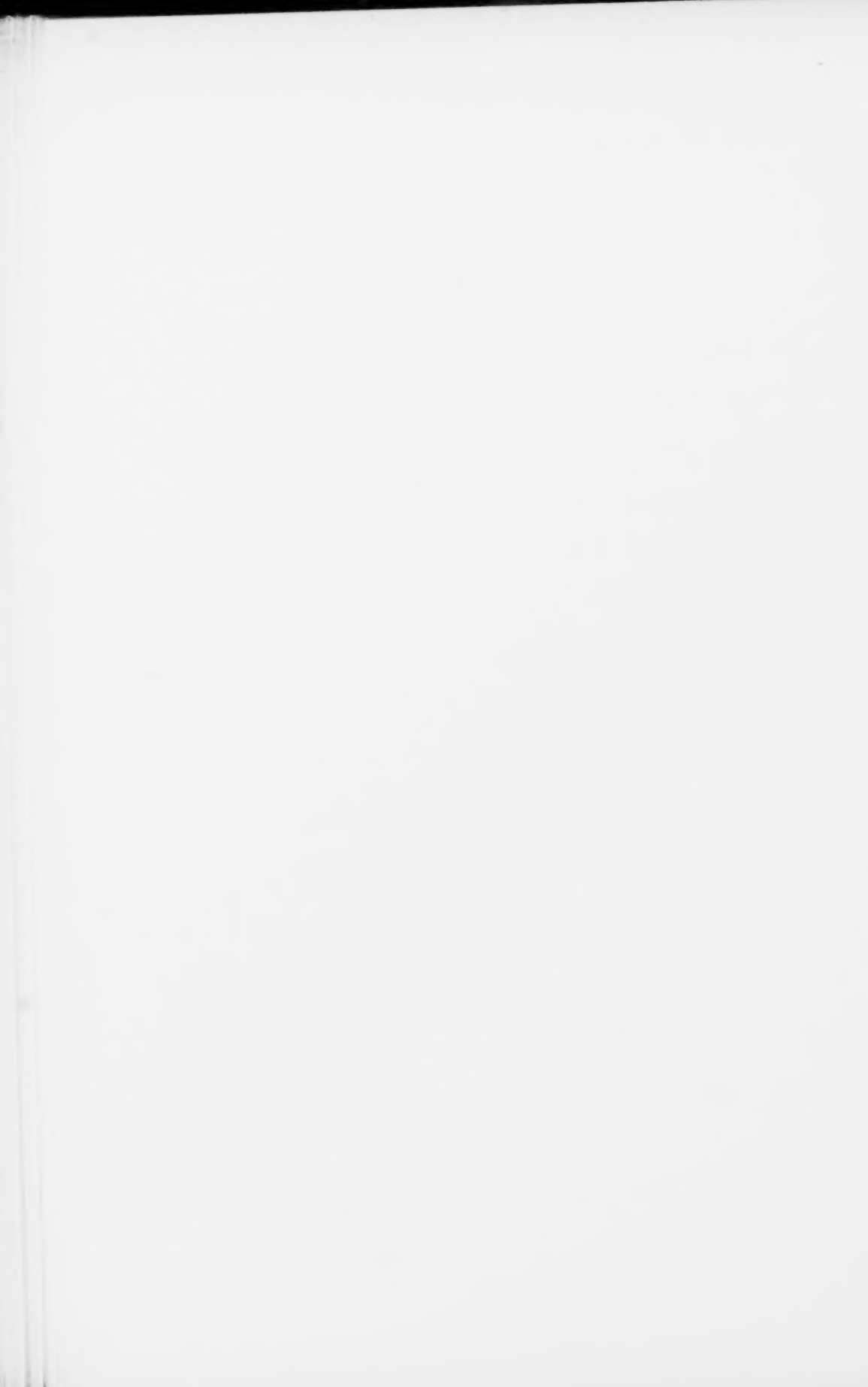
**RULE 9.107 RULES
EXCLUSIVE ON DISCIPLINE**

(A) Proceedings for Discipline.

Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

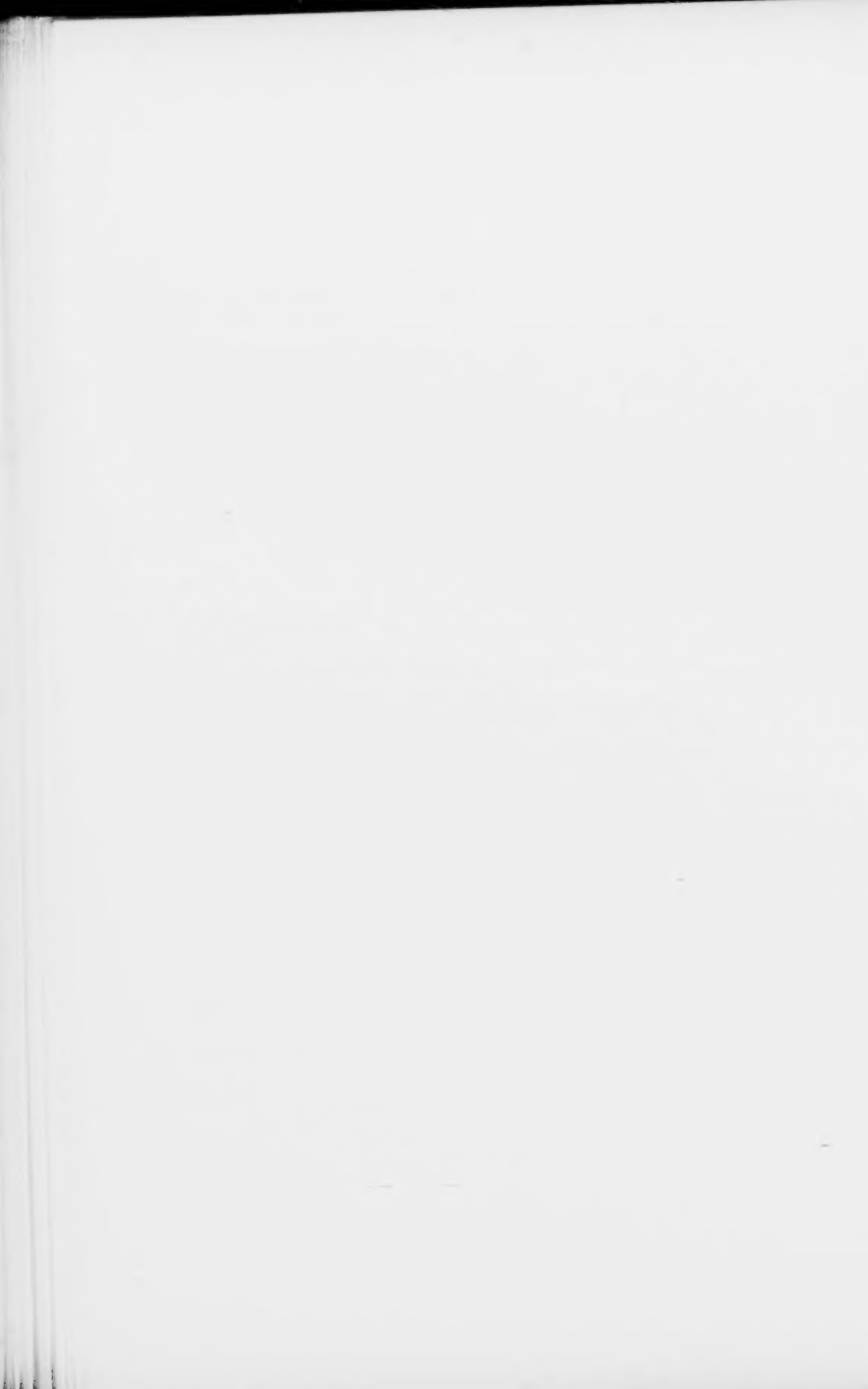
**RULE 9.108
ATTORNEY GRIEVANCE COMMISSION**

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.



(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder



of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members present.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.



(E) Powers and Duties. The commission has the power and duty to

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator and his or her staff;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the state bar board of commissioners



for approval;

(6) submit to the Supreme Court proposed changes in these rules; and

(7) annually submit to the Supreme Court a report summarizing the commission's activities during the past year; and

(8) perform other duties provided in these rules.

[Amended effective July 27, 1990; September 14, 1990; amended September 25, 1990; amended effective February 1, 1991.]

RULE 9.109 GRIEVANCE ADMINISTRATOR

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall

appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

RULE 9.115 HEARING PANEL PROCEDURE

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be

served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) **Complaint.** Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(E) Representation by Attorney.

The respondent may be represented by an attorney, who must enter an appearance.

(F) Prehearing Procedure.

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness.



RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) **Authority of Board.** The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

(B) **Composition.** The board consist of 5 attorneys and 2 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

RULE 9.122 REVIEW BY SUPREME COURT

(A) **Kinds Available: Time for Filing.**

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply

for leave to appeal to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9.114(A), a party aggrieved by the dismissal may file a complaint for mandamus in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will

automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

[Amended effective June 1, 1987.]

RULE 9.126 OPEN HEARINGS; CONFIDENTIAL
FILES AND RECORDS

(A) Investigations.

Investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

RULE 9.127 ENFORCEMENT

(A) Interim Suspension. The

Supreme Court, the board, or a hearing panel may order the interim suspension of

a respondent who fails to comply with its lawful order.

**RULE 9.131 INVESTIGATION OF MEMBER OR
EMPLOYEE OF COMMISSION OR BOARD**

(A) Commission Member or Employee. If the request is for investigation of any attorney who is a member or employee of the commission, the following provisions apply:

(2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(3) The Supreme Court shall review the request for investigation and the answer shall either dismiss the request for investigation or appoint volunteer counsel to investigate the matter.

(B) Board Members or Employee.

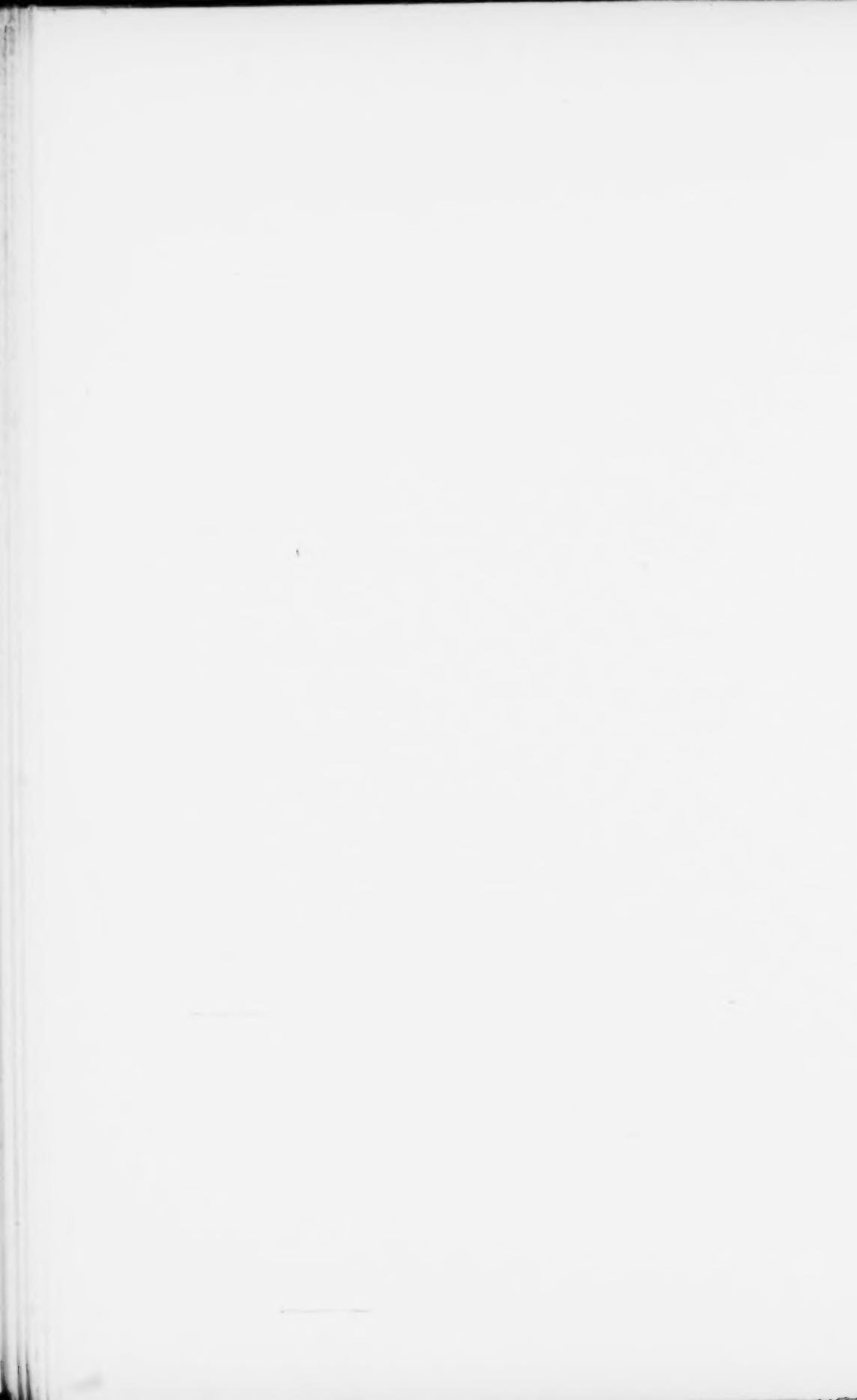
Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(C) Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. If the request is for an investigation of an attorney for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (a) shall be followed. A request for investigation that alleges misconduct of

this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.

MICHIGAN RULES OF PROFESSIONAL CONDUCT



MICHIGAN RULES OF PROFESSIONAL CONDUCT

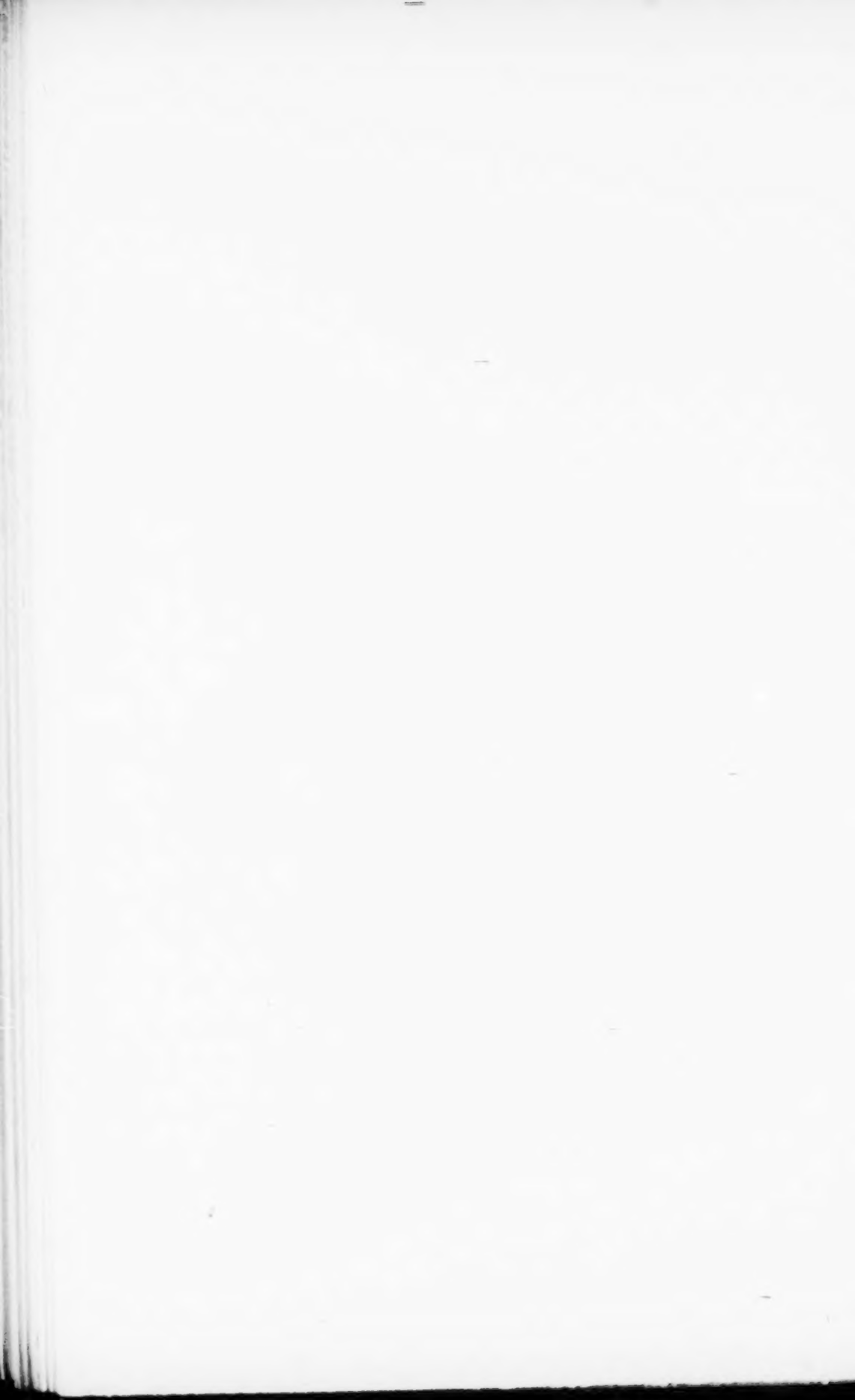
RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT.

- (a) A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.
- (b) A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judicial

Tenure Commission.

- (c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

AMERICAN BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT



AMERICAN BAR ASSOCIATION

MODEL RULES OF PROFESSIONAL CONDUCT

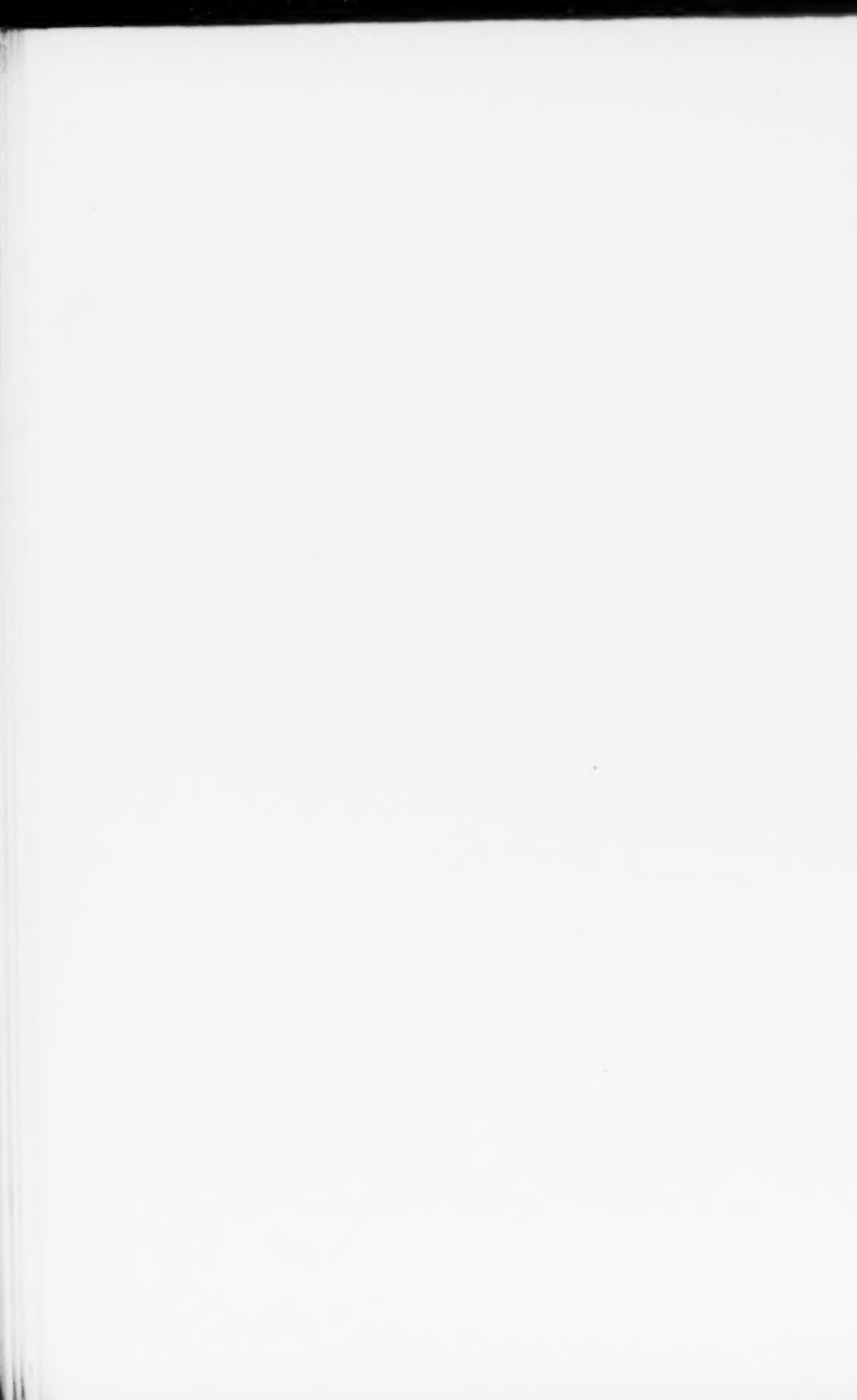
**Rule 8.3 Reporting Professional
Misconduct.**

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyers's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises

a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

MICHIGAN COMPILED LAW



MICHIGAN COMPILED LAW

600.904 Regulation by supreme court

Sec. 904. The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

MICHIGAN CONSTITUTION PROVISIONS

Mich. Const., Art. VI

SECTION 5. Court rules; distinctions
between law and equity; master in
chancery

Sec. 5 The supreme court shall by
general rules establish, modify, amend
and simplify the practice and procedure
in all courts of this state. The
distinctions between law and equity
proceedings shall, as far as practicable,
be abolished. The office of master in
chancery is prohibited.


ORDER OF THE MICHIGAN SUPREME COURT

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

ORDER

Entered: April 25, 1991

91391 & (3) (4) (5)


Complainant,

V

SC: 91391

AGC No.

2190/90

ATTORNEY GRIEVANCE COMMISSION,
Respondent.

_____ /

On order of the Court, motions
for immediate consideration are considered

and they are GRANTED. The complaint for mandamus is treated as a motion for superintending control and it is also considered. Relief is DENIED because the Court is not persuaded that it should grant the requested relief. The motion by complainant to seal the record is also considered and it is DENIED. The Court, on its own motion, pursuant to MCR 9.126, redacts the pleadings. Specifically, MCR 9.126(A) provides in relevant part: "Investigations by the [grievance] administrator or the staff may not be made public."

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 25 _____, 1991 _____

Clerk

③
No. 91 484

Supreme Court, U.S.
FILED

OCT 15 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

IN RE GRAND JURY 89-4-72,
MICHIGAN ATTORNEY GRIEVANCE COMMISSION,
Petitioner,
- vs -
DOE #1, *Respondent.*

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOPATIN, MILLER, FREEDMAN, BLUESTONE,
ERLICH, ROSEN AND BARTNICK
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

ISSUE I

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT DISCLOSURE OF GRAND JURY MATERIALS TO THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION WAS NOT "PRELIMINARILY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING"?

ISSUE II

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION HAD NOT DEMONSTRATED A PARTICULARIZED NEED FOR THE REQUESTED EVIDENCE?

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No. 91484

In The
Supreme Court of the United States

October Term, 1991

IN RE GRAND JURY 89-4-72,
MICHIGAN ATTORNEY GRIEVANCE COMMISSION,

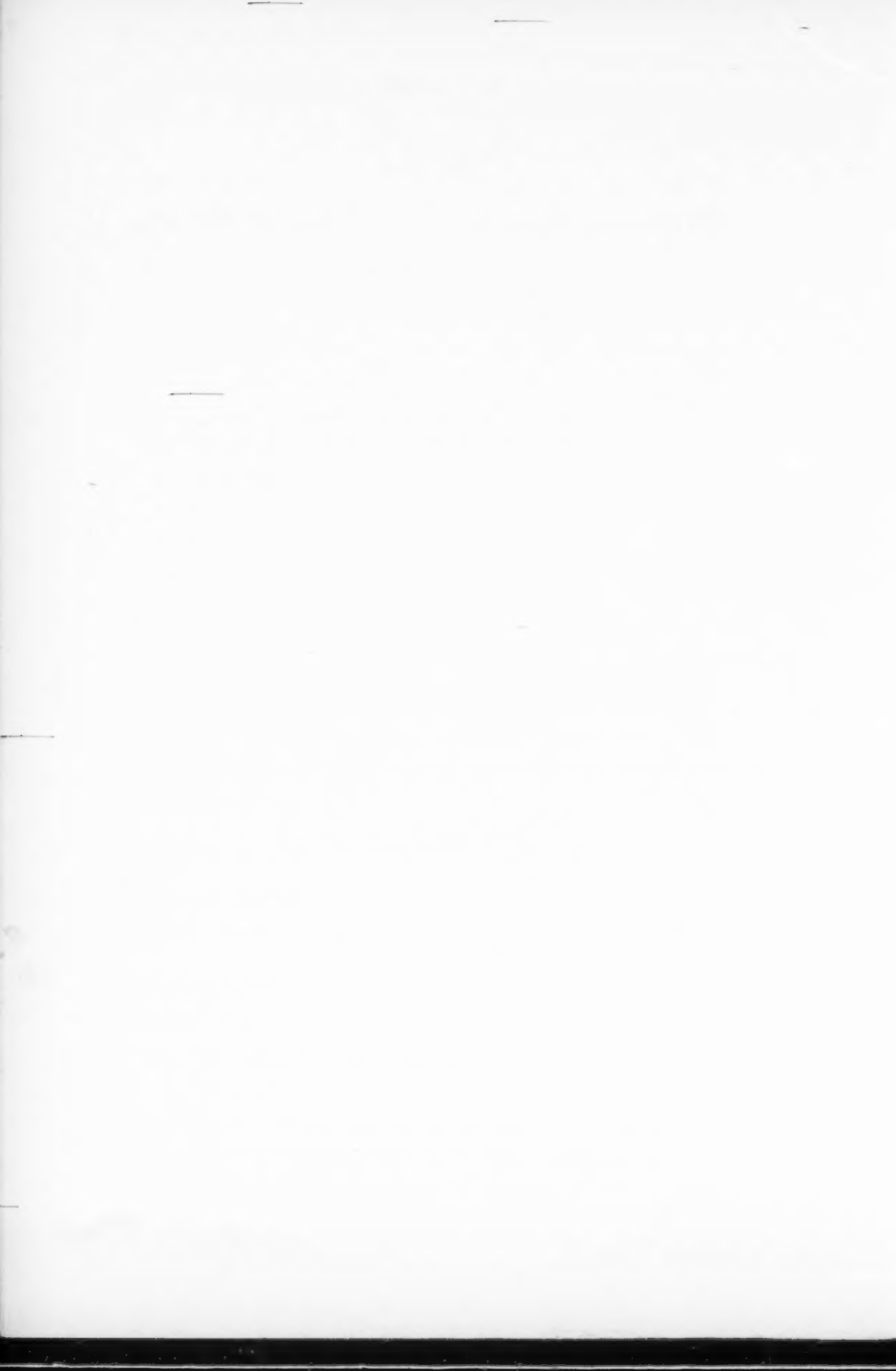
Petitioner,

— vs —

DOE #1,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



COUNTERSTATEMENT OF FACTS

On September 10, 1990, Dennis Path, an investigator for the State Bar of Michigan, filed a Request for Investigation with the State of Michigan, Attorney Grievance Commission ("Commission") alleging various improprieties by Doe #1 ("Doe" or "respondent"). The next day the Commission filed a Motion of the Michigan Attorney Grievance Commission for Disclosure of Evidence Compiled in the Course of Grand Jury Investigation Concerning Conduct of Attorneys,¹ in the United States District Court for the Eastern District of Michigan. The Commission had conducted no investigation into Path's allegations prior to its request for disclosure of grand jury proceedings. The grand jury proceedings had not resulted in an indictment. *In re Grand Jury 89-4-72*, 932 F2d 481, 482 (6th Cir. 1991)

The district court granted the Commission's request; respondent filed a motion to stay disclosure pending appeal, which was granted and the appeal proceeded. *Id.*, at 482-483.

On April 26, 1991, the United States Court of Appeals for the Sixth Circuit reversed the district court.

Because the district court erred in concluding that disclosure to the Commission was "preliminary to or in connection with a judicial proceeding" and in determining that the Commission had demonstrated a particularized need for the evidence requested, we reverse. [*Id.*, at 482.]

On June 20, 1991, the Sixth Circuit denied the Commission's petition for rehearing, and for rehearing en banc.²

¹ Photocopies of all the pleadings, Opinion and Orders in the United States District Court for the Eastern District of Michigan have been lodged under seal with the Clerk of this Court, according to the Commission.

² Commission's "Statement of the Case" omitted mention of the fact that the petition for hearing en banc had been requested and

The Commission advises this Honorable Court that it has been conducting a "vigorous investigation" and "subpoenaed *numerous* witnesses" (emphasis in original) since seeking grand jury materials disclosure a year ago. (Petitioner's Brief, p. 62)

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The Court of Appeals for the Sixth Circuit, thoroughly and comprehensively analyzed Rule 6(e)(3)(C)(i) of the Fed.R.Crim.P. The Court considered the opinions of both this Court and sister federal courts as applicable to the Michigan scheme for attorney discipline. The Sixth Circuit properly found that a two-tiered administrative procedure, with only discretionary review by the state supreme court, did not pass muster as "preliminarily to or in connection with a judicial proceeding." Although not necessary for reversal, the Sixth Circuit further determined, again relying on precedent, that the Commission had not demonstrated a particularized need for disclosure.

Through utilization of misstatement, misinterpretation and mischaracterization of the Michigan Court Rules and the Sixth Circuit's decision, the Commission seeks unmerited further review.

The Commission also selectively supplied some of the Michigan Court Rules in Chapter 9 of the Michigan Court Rules at pages 58-77 of its Appendix. We respectfully advise the Court that this is not a complete duplication of "Chapter of Professional Disciplinary Proceedings." When we discuss those Rules which the Com-

(continued from page 1)

denied by all active judges of the Sixth Circuit with "no judge of this court having requested a vote on the suggestion for rehearing en banc. . . ." (Order 6/20/91), although the Order appears twice in its Appendix. (Petitioner's Appendix, pp. 47-50)

mission did not see fit to reproduce, we quote them in footnotes.

The Sixth Circuit opinion is firmly grounded on copious precedent, consistent with the decisions of sister courts of appeals, and presents no question for the exercise of this Court's discretionary review.

ISSUE I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT DISCLOSURE OF GRAND JURY MATERIALS TO THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION WAS NOT "PRELIMINARILY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING."

Introduction

After discussing the factual background of the within cause, the Sixth Circuit explained the historic role of the grand jury, its extraordinary investigatory powers, and the principle of grand jury secrecy which "has long been deeply ingrained in the American legal jurisprudence. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *Federal Deposit Insurance Corp. v. Ernst & Whinney*, 921 F.2d 83, 86 (6th Cir. 1990)." *In re Grand Jury* 89-472, *supra*, at 483. The court recognized that the common law codification of grand jury secrecy set forth in Rule Fed.R.Crim.P. 6(e)(2) is subject to stated exceptions, and focused upon Rule 6(e)(3)(C)(i).

Rule 6(e)(3)(C)(i) establishes a two-step standard permitting disclosure of grand jury material otherwise prohibited to a party who demonstrates that (1) the disclosure is sought "preliminarily to or in connection with a judicial proceeding[.]" and (2) a compelling need for disclosure exists which will overcome the general presumption in favor of grand jury secrecy. [*Id.*, at 483.]

The court addressed the first step and, quoting from *United States v. Baggot*, 463 U.S. 476, 463 S.Ct. 476, 77 L.Ed.2d 785 (1983), explained that the focus was on the actual use to be made of the material; *i.e.* whether the primary purpose of disclosure is to assist in the preparation or conduct of a judicial procedure. As *Baggot* is of controlling significance, we quote more extensively from that portion excerpted by the Sixth Circuit in the footnote.³

The Sixth Circuit considered the sort of proceedings that might qualify as judicial proceedings under *Baggot*. It began with Judge Learned Hand's seminal opinion, *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958), wherein disclosure of grand jury information was sought for disciplinary proceedings against an attorney. The *Rosenberry* court found the state's disciplinary procedures to be "judicial in nature because they were presented before the Appellate Division of the New York Supreme Court." *Id.*, at 119.

Twenty-five years later, the *Rosenberry* definition had been given "the gloss" (*In re Grand Jury* 89-4-72, at 484) of succeeding decisions, culminating in *Baggot*, wherein this Court explained that "[t]he fact that judicial

³ The particularized-need test is a criterion of *degree*; the "judicial proceeding" language of (C)(i) imposes an additional criterion governing the *kind* of need that must be shown. It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. Thus, it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted. See *United States v. Young*, 494 F.Supp. 57, 60-61 (E.D. Tex. 1980) [*Id.*, at 480] (emphasis in original).

redress may be sought, without more, does not mean that the Government's action is 'preliminar[y] to a judicial proceeding.' *United States v. Baggot*, 463 U.S., at 480. The Sixth Circuit explained that "other circuits have suggested that disclosure . . . to an administrative body such as a bar disciplinary committee, may be considered preliminary to judicial proceeding where a *significant* judicial role exists in the operation of the regulatory/statutory scheme." *In re Grand Jury 89-4-72*, *supra*, at 485 (emphasis added) (citations omitted). The Sixth Circuit cited and distinguished virtually every case (*Id.*) which the Commission again parades before this Court. (Petitioner's Brief, pp. 11-12). We shall not unduly lengthen this brief by an exhaustive review of Sixth Circuit scholarship. We merely note, *e.g.*, that in *In the Matter of Disclosure of Testimony Before the Grand Jury*, 580 F2d 281 (8th Cir. 1978) disclosure was upheld as the disciplinary procedure led to a judicial hearing.¹ Again, in *In the Matter of Federal Grand Jury Proceedings (United States v. Doe)*, 760 F2d 436 (2d Cir. 1985), a post-*Baggot* case, the court held that although the request before it was premature as no witnesses had yet testified in the disciplinary proceedings, disclosure continued to be permissible under New York attorney disciplinary procedure. Disclosure was permissible because investigations are ordered and cases subsequently heard by the Appellate Division of the New York Supreme Court.

Just as it persists in citing distinguishable cases, the Commission continues to rely upon *In the Matter of Electronic Surveillance*, 569 FSupp. 991, 999 (E.D. Mich. 1984), although it was not factually analogous.

In *Electronic Surveillance*, the Michigan Grievance Administrator sought information which had not been

¹ The district court's opinion, *United States v. Salantito*, 436 FSupp. 240, 243 (D.Neb. 1977), indicates that the Nebraska procedure leads to a hearing before the Nebraska Supreme Court.

presented to the grand jury. Accordingly, that information was not secret and was not within the purview of Fed.R.Crim.P. 6(e)(2). *Id.*, 596 F.Supp., at 995, 997:

The Grievance Administrator is seeking disclosure of approximately two hours of surveillance materials which were not played to any grand jury.

The electronic surveillance materials sought by the Grievance Administrator were not presented to the grand jury. They are not, therefore, within the literal meaning of "matters occurring before the grand jury." Since disclosure would not implicate any of the reasons underlying the policy of grand jury secrecy, the court holds that the electronic surveillance material sought by the Grievance Administrator are not governed by Rule 6(e). (footnote omitted).

Having determined that the requested information was not protected by Fed.R.Crim.P. 6(e)(2), the *Electronic Surveillance* opinion noted that if Rule 6(e) were germane, the court would find that attorney disciplinary proceedings are judicial in nature, as contemplated by Rule 6(e).

The later observation was clear *obiter dicta*. In addition, *Electronic Surveillance* is fatally flawed, as is revealed by a review of Michigan's attorney disciplinary procedure, discussed *infra*. The Sixth Circuit properly found it unnecessary to give *Electronic Surveillance* weight or deference pursuant to *Salve Regina College v. Russell*, — U.S. —, 111 S.Ct. 1217, — L.Ed.2d — (1991), and held that *In the Matter of Electronic Surveillance*, *supra*, was incorrectly decided.

It is clear beyond cavil that administrative agencies, and proceedings before such agencies, are not entitled to disclosure. See, e.g. *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962), which denied a grand jury disclosure request by the Federal Trade Commission; and

United States v. Baggot, supra, which refused disclosure to the Internal Revenue Service.

After extensive analysis, the Sixth Circuit determined that "the Michigan attorney discipline procedures do not evidence a substantial judicial role in the proceedings." *In re Grand Jury 89-472, supra*, at 487. The Court properly held that Michigan uses "an administrative scheme to regulate the practice of law . . . with only discretionary review by the state supreme court. . . ." *Id.*, at 488. Accordingly, "the Commission falls within the same category as do all administrative agencies which are denied access to federal grand jury material under Rule 6(e)(3)(C)(i), even though the Commission's purview includes the regulation of the right to practice law." *Id.*

A. The Sixth Circuit Correctly Analyzed Michigan's Attorney Disciplinary Procedure.

The Commission's attack on the Sixth Circuit reaches a nadir in its argument contending that the Court analyzed the Michigan attorney discipline system incorrectly. (Petitioner's Brief, pp. 20-30) It is replete with misstatements, mischaracterizations and misinterpretations. We refer to some of the most glaring examples.

The first one appears at pages 21-22 of Petitioner's brief wherein the Commission said:

[T]he Court misstated the role of the Attorney Discipline Board when it stated that it is the "Board's responsibility to investigate and discipline attorneys suspected of misconduct. Rule 9.105."

The Commission then asserted that the Attorney Discipline Board does not "investigate," it supervises and disciplines. (Petitioner's Brief, p. 22)

The Sixth Circuit actually said:

The primary responsibility of the Board is to investigate and discipline attorneys suspected of misconduct. M.C.R. 9.105.

The Board's investigatory needs are served by the Attorney Grievance Commission which supervises and approves inquiries into alleged attorney malfeasance. M.C.R. 9.108(D)(2); 9.109(A)(5). . . . [*In re Grand Jury 89-4-72, supra*, 932 F2d, at 485.]

The Sixth Circuit understood perfectly that the Attorney Grievance Commission does the investigating and the Attorney Discipline Board does the disciplining. By quoting one sentence in the opinion and omitting the following sentence, the Commission attempts to mislead this Court.

Next, the Commission states that

The Court of Appeals also mischaracterized the disciplinary hearings before the Board as being "ex parte." (Doe Opinion) (citation omitted). [Petitioner's Brief, p. 22]

The Commission cites to the page in its Appendix which is found in *In re Grand Jury 89-4-72*, 932 F2d, at 487. The Court of Appeals did *not* say that the Board's disciplinary proceedings were *ex parte*. The phrase "*ex parte*" appears in a direct quotation from another case. In addition, the Commission's investigation is, in fact, *ex parte*. M.C.R. 9.112-9.114.⁵

⁵ Rule 9.112 Requests for Investigation

(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not required for filing a request for investigation.

The Commission says "Recently the Michigan Supreme Court amended its rules so that now all members of the Attorney Discipline Board are appointed by

(continued from page 8)

(B) *Form of Request.* A request for investigation of alleged misconduct must

- (1) be in writing;
- (2) describe the alleged misconduct, including the approximate time and place of it;
- (3) be signed by the complainant; and
- (4) be filed with the administrator.

(C) *Handling by Administrator.*

(1) *Request for Investigation of Attorney.* After making a preliminary investigation, the administrator shall either

- (a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or
- (b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) *Request for Investigation of Judge.* The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) *Request for Investigation of Member or Employee of Commission or Board.* Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(continued on page 10)

the Michigan Supreme Court." (Petitioner's Brief, p. 23)
The inference is that the Sixth Circuit erred in its

(continued from page 9)

Rule 9.113 Answer by Respondent

- (A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.
- (B) Refusal or Failure to Answer.
 - (1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.
 - (2) The failure to answer by a respondent within the time permitted is misconduct. See MCR 9.104(7).
 - (3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.
- (C) Attorney-Client Privilege. A person who files a request for investigation of an attorney waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

Rule 9.114 Action by Administrator or Commission
After Answer

- (A) Action After Investigation. After an answer is filed or the time for filing expires, the administrator may assign the request and answer for further investigation or informal hearing. When investigation is complete, the administrator shall refer the request to the commission for its review. The commission may direct that a complaint be filed, that the request be dismissed, or that the respondent be admonished with his or her consent.
- (B) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about

(concluded on page 11)

description. The Commission neglected to mention that this amendment was effective June 3, 1991, over five weeks after the Sixth Circuit opinion issued.

Most important, it is irrelevant that the Michigan Supreme Court appoints the lay persons and attorneys who respectively constitute the Attorney Grievance Commission and the Attorney Discipline Board. No

(continued from page 10)

the respondent. Law enforcement officers are requested to comply promptly with each request.

(C) Subpoenas.

- (1) On request of the administrator or the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents and other tangible things before the administrator or an investigator concerning matters then under investigation.
- (2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear and give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(D) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation dismissed by the commission without a hearing before a hearing panel.

(E) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

- (1) The administrator may destroy the files or records relating to a request for investigation dismissed by the commission after 3 years have elapsed from the date of dismissal.
- (2) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after 3 years have elapsed from the date when they were created or acquired by the commission.

judges serve on either body. Pursuant to its rule-making power,⁶ the Michigan Supreme Court appoints the members who serve on the Standard Jury Instruction Committee.⁷ Some of them are judges; all are attorneys. Judicial appointment of personnel does not transform the proceedings of an administrative agency into a judicial proceeding.

Finally, the Commission makes a great "to do" over the Sixth Circuit's references to funding by a "private organization." (Petitioner's Brief, p. 24) It is clear from a reading of the opinion as a whole that the use of that phrase (*In re Grand Jury* 89-4-72, *supra*, 932 F.2d, at 487) was a reference to the private funding (*Id.*, at 485) of M.C.R. 9.105. The applicable sentence in the Rule is:

The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator.

Clearly, the Sixth Circuit was distinguishing the Michigan agency's funding from funding raised from, or belonging to, the people or community at large. *Black's Law Dictionary*, 4th ed, p. 1393.

Most critical, the Sixth Circuit fully appreciated that in Michigan a Commission of nonjudges investigates and brings charges against attorneys (prosecutorial arm) (M.C.R. 9.108) which are heard and decided by a panel of the Attorney Discipline Board (adjudicative arm) (M.C.R. 9.110; M.C.R. 9.111; M.C.R. 9.115); and appeals from Board

⁶ The supreme court has the authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record. . . . [M.C.L. 600.223; M.S.A. 27A.223.]

⁷ The Standard Jury Instruction Committee appointed by the Supreme Court has the authority to adopt standard jury instructions and to amend or repeal standard jury instructions in effect. . . . [M.C.R. 2.516(D)(1).]

panels are heard by the full Board (nonjudges) (M.C.R. 9.118).⁸ After charges have been brought by private citi-

⁸ Rule 9.118 Review of Order of Hearing Panel

(A) Review of Order: Time.

- (1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of the hearing panel filed under MCR 9.115(J). A petition for review must set forth the reasons and grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition on the other party and file a proof of service with the board.
- (2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner.
- (3) A delayed petition for review may be considered by the board under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. On timely filing of a petition for review, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The board must serve the order to show cause on the administrator, complainant, and respondent at least 21 days before the hearing. Failure to comply with the order to show cause, including but not limited to a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing

- (1) A hearing on the order to show cause must be heard by the subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).
- (2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony.

(concluded on page 14)

zens and heard by two layers of private citizens, the Michigan Supreme Court may, in its discretion, grant review.⁹ Significantly, in *Electronic Surveillance, supra*, the case so heavily relied upon by the Commission, the federal district court judge observed that leave to appeal is rarely granted. *Id.*, 569 F.Supp., at 999.

All the Commission's attempts to mislead are unavailing. The Sixth Circuit accurately assessed the essence of the Michigan discipline procedures:

On the record here we find the Michigan attorney discipline procedures do not evidence a substantial judicial role in the proceedings. We

(continued from page 13)

pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision; Motion for Reconsideration; Stay. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier. The board may grant a stay pending its decision on a motion for reconsideration, which may be filed at any time before the board's order takes effect. If the board grants a stay, the stay remains effective for 21 days after the board enters its order granting or denying reconsideration.

(E) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

⁹ M.C.R. 7.301 Jurisdiction and Term

(A) Jurisdiction. The Supreme Court may:

* * *

(3) review by appeal a final order of the Attorney Discipline Board (See MCR 9.122;)

are not prepared to call an administrative hearing before a panel of private attorneys and laypersons, funded by a private organization, with limited discretionary review to the Michigan Supreme Court, a "judicial proceeding" within the meaning of Rule 6(e)(C)(i). That the disciplinary proceedings are sanctioned under the authority of the state supreme court is irrelevant. No amount of artificial judicial procedure or due process can transform such an administrative panel into a judicial body within the meaning of the Rule. [*In re Grand Jury* 89-4-72, *supra*, 932 F2d. at 487.]

As the Sixth Circuit pointed out, even a mandatory Michigan Supreme Court review would not automatically transform an administrative hearing into a judicial hearing in light of *Baggot*. *Id.*

Michigan has chosen an administrative scheme, which places the Commission in the same category with all other administrative agencies which are denied access to grand jury material. *Id.*, at 488.

Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i). [*Baggot*, *supra*, 463 U.S., at 482.]

The Sixth Circuit scrupulously followed this Court's pronouncements in arriving at its conclusion. Clearly, further review is not merited.

B. The Sixth Circuit Properly Held That An Administrative Agency Is Denied Access To Federal Grand Jury Material Under Rule 6(e)(3)(C)(i).

Petitioner devotes pages 30-36 of its brief to a plea for a change in Rule 6(e)(3)(C)(i). This argument undoubtedly had its genesis in the Sixth Circuit's observation,

set forth in footnote 10.¹⁰ *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 572-573, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983), which we discuss and quote *infra* under the "particularized need" issue, makes it clear that this Court will not expand the exceptions under the Rule to suit the predilections of a petitioner in a given case.

The Sixth Circuit scrupulously followed the dictates of this Court in its many expressions of the necessity to hold inviolate the secrecy of the grand jury,¹¹ and to protect the Rule from being swallowed by its exceptions. *Baggot* makes it clear that administrative agencies are not within the ambit of Rule 6(e)(3)(C)(i).

The fact that judicial redress may be sought, without more, does not mean that the Government's action is "preliminar[y] to a judicial proceeding." Of course, it may often be loosely said that the Government is "preparing for litigation," in the sense that frequently it will be wise for an agency to anticipate the chance that it may be called upon to defend its actions in court. That, however, is not alone enough to bring an administrative action within (C)(i). Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action

¹⁰ We are not unaware of those commentators who have urged the courts to make grand jury materials more accessible to administrative agencies in an effort to reduce duplicative investigations. See, e.g., Note, 80 Mich. L. Rev. at 1672. However, Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule. Accordingly, we find disclosure to the Commission is not ordered "preliminarily to or in connection with a judicial proceeding" within the limited secrecy exception provided by Rule 6(e)(3)(C)(i). [*In re Grand Jury 89-4-72, supra*, at 488.]

¹¹ E.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1948); and *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983).

is not preliminary to a judicial proceeding for purposes of (C)(i). [*Baggot, supra*, 463 U.S., at 481-482.]

The agency action here does not require resort to litigation, but rather takes place without judicial intervention — which can only be obtained by grace — after two levels of nonjudicial citizens have, respectively, meted out and reviewed punishment. Indeed, as noted above, such grace is rarely granted. The mantle of secrecy remains in place under such circumstances.

Petitioner seeks to equate this case with *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1260 (11th Cir. 1984), *cert. denied*, 469 U.S. 889, 105 S.Ct. 254, 83 L.Ed.2d 1991 (1984). There is no proper analogy. There, a federal district court judge had previously been indicted, tried and acquitted. Five federal judges were investigating whether the aforescribed "Article III judge should be recommended for impeachment by Congress, otherwise disciplined, or granted a clean bill of health. . . ." *Id.*, at 1269. The federal statute, 28 U.S.C. § 372(C)(5), gave the committee express statutory authority to "conduct an investigation as extensive as it considers necessary. . . ." *Id.*

The court explained that

Beyond this construction derived from the breadth of the statutory language, there is support in legislative history for the specific proposition that Congress intended a judicial investigating committee to have access to grand jury minutes. . . . [*Id.*, at 1270.]

After analysis of the legislative history, the court said

We accordingly view an investigating committee's petition to inspect grand jury materials as being backed by a congressional mandate; and we believe this mandate furnishes special justification for the district court to exercise its super-

visory power upon a committee's request. . . .
[*Id.*]

Although the court also found a further justification of this investigation of a federal judge by other federal judges in the Rule 6(e)(3)(C)(i) and cited, *inter alia*, *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889, it is noteworthy that *Erdmann* dealt with the New York disciplinary proceedings discussed *supra*. In New York the Appellate Division of each judicial department hears alleged attorney misconduct cases. We have gone full circle: where the judiciary does the hearing and deciding, the state bar disciplinary proceedings lie within the ambit of the Rule 6(e)(3)(C)(i) exception. Where layers of citizen administrative bodies hear and decide state bar disciplinary matters, they are beyond the pale.

It is worthy of passing note that, in Michigan, the fate of its judges alleged to have committed acts of misconduct is not placed in lay hands. The Judicial Tenure Commission can only recommend; the Michigan Supreme Court makes the decision. See *In the Matter of Del Rio*, 400 Mich. 665, 689, 256 N.W.2d 727 (1977):

Initially, we must make it clear that the respondent is operating under a gross misconception if he believes that the Commission exercises any *disciplinary* function. Pursuant to GCR 1963, 932.25, this Court and this Court alone decides what, if any, disciplinary action shall be taken against any elected member of the state judiciary.¹²

¹² G.C.R. 1963, 932.25, referred to in *Del Rio*, is the current M.C.R. 9.225. We quote same and its Note, and advise the Court that the "proceedings" referred to in the text of the Rule are the proceedings of the Judicial Tenure Commission, which are reviewed *de novo*. *In re O'Brien*, 430 Mich. 323, 422 N.W.2d 685 (1988); *In re Loyd*, 424 Mich. 514, 384 N.W.2d 9 (1986).

Rule 9.225 Decision by Supreme Court

The Supreme Court shall review the record of the proceedings and shall file a written opinion and judgment, which

(concluded on page 19)

An administrative agency cannot avail itself of Rule 6(e)(3)(C)(i), be it the Federal Trade Commission (*In re Grand Jury Proceedings*, 309 F.2d 440, 443 [3d Cir. 1962]); the Internal Revenue Service (*Baggot, supra*) or the Michigan Attorney Grievance Commission (*In re Grand Jury 89-4-72, supra*).

C. The Principle Of Grand Jury Secrecy, As Expressed By This Court And Codified By Rule 6(e), Is Not Susceptible To Administrative Contortion Or Subversion.

Petitioner argues at length (Commission's Brief, pp. 37-40), that Rule 6(e) violates a Michigan Rule of Professional Conduct by precluding a United States attorney, who is a member of the Michigan bar, from disgorging grand jury proceedings to the Michigan Grievance Commission. This novel distortion of the Michigan Court Rules is unsupported by precedent and is raised for the first time in the petition for certiorari. It merits a swift demise.

Petitioner invites this Court to invalidate 6(e) and the volumes of jurisprudence protecting grand jury secrecy so that a United States attorney can open the grand jury room to an administrative agency.

This is, we submit, preposterous, convoluted reasoning. Nothing in M.R.P.C. 8.3 requires a United States attorney to violate the Federal Rules of Criminal Procedure. If an applicant for grand jury proceedings can fit itself into an exception, the United States attorney will be ordered by a federal district court to turn over the records pursuant to a Rule 6(e)(3)(D) proceeding. If an applicant cannot fit itself into a Rule 6(e) exception, the

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may direct censure, removal, retirement, suspension, or other disciplinary action, or reject or modify the recommendations of the commission.

Note

MCR 9.225 is substantially the same as GCR 1963, 932.25.

secrecy is inviolate. The United States attorney cannot act without a federal court order. An administrative agency, such as petitioner here, cannot order such action. We respectfully submit that the argument is absurd.

ISSUE II

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION HAD NOT DEMONSTRATED A PARTICULARIZED NEED FOR THE REQUESTED EVIDENCE.

As the Sixth Circuit held "that disclosure to the commission is not preliminary to a judicial proceeding" *In re Grand Jury* 89-4-72, *supra*, 932 F.2d at 488-489, it did not need to devote extensive effort to the second prong of Rule 6(e)(3)(C)(i) disclosure, particularized need. However, it did note that the lower court's conclusion as to the degree of need requisite was inconsistent with its recent holding in *Federal Deposit Insurance Corp. v. Ernst & Whinney*, 921 F.2d 83 (6th Cir. 1990).

The *Ernst & Whinney* decision, which the Commission also disputes, was firmly grounded upon the principles long expounded by this Court:

Finding that we have jurisdiction, we now grant the writ of mandamus. Federal Criminal Procedure Rule 6(e)(2)'s general prohibition of disclosure of matters occurring before a federal grand jury represents a strong and longstanding policy designed to promote the candid and free testimony of witnesses who appear before a grand jury. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432, 103 S.Ct. 3133, 3142, 77 L.Ed.2d 743 (1983); *United States v. Procter & Gamble*, 356 U.S. 677, 681-82, 78 S.Ct. 983, 985-86, 2 L.Ed.2d 1077 (1958); *In re Grand Jury Proceedings*, 841 F.2d 1264, 1268 (6th Cir.1988). Consequently, exceptions to the general rule are made only in cases of compelling necessity — "where there is proof that

without access to the grand jury materials, a litigant's position would be 'greatly prejudiced' or 'an injustice would be done.'" *United States v. Procter & Gamble*, 356 U.S. at 681-82, 78 S.Ct. at 986. [*Id.*, at 86.]

We discuss the landmark citations *infra*. *Ernst & Whinney* also answered petitioner's argument as to "district court discretion" and succinctly disposed of assertions of relevance, expediency or cost-cutting:

While we recognize that the district court has wide discretion to decide whether the need for secrecy predominates or the need for disclosure predominates, the discretion is predicated on the district court being properly seized of the question by the movant's demonstration of a particularized need. In the case before us, *Ernst & Whinney* has merely subpoenaed grand jury documents from the Bureau. They have not made any particularized showing as required in *Douglas Oil*.

The fact that the grand jury documents are relevant or that production of them by the Bureau would expedite civil discovery or reduce expenses for the parties is insufficient to show particularized need when the evidence can be obtained through ordinary discovery, *i.e.*, subpoenaing the documents from other sources, or pursuing other routine avenues of investigation. [*Id.*, at 86-87.] (citations omitted).

We expand only to emphasize the propriety of the Sixth Circuit's opinion. Two of this Court's decisions, cited in *Ernst & Whinney* are controlling: *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) and *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). Significantly, in neither case was disclosure permitted. In *Procter & Gamble*, the Court noted "a long established

policy that maintains the secrecy of the grand jury proceedings in the federal courts." *Id.*, 356 U.S., at 681 (footnote omitted). In a footnote, the Supreme Court repeated the reasons for secrecy, stating:

In *United States v. Rose*, 3 Cir. 215 F.2d 617, 628-629, those reasons were summarized as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes; (5) *to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation*, and from the expense of standing trial where there was no probability of guilt. [*Id.*] (emphasis supplied).

The *Procter & Gamble* opinion explained that there are instances when a compelling necessity "will outweigh the countervailing policy. But *they must be shown with particularity.*" *Id.*, 682 (emphasis supplied). The Court continued:

No such showing was made here. The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done. . . . [*Id.*]

The Court concluded:

It is only where the criminal procedure is subverted that "good cause" for *wholesale* discovery and production of a grand jury transcript would be warranted. . . . [*Id.*, at 684.] (emphasis in original).

In the second United States Supreme Court decision, *i.e.* *Sells Engineering, supra*, while recognizing that it would be a substantial help to a Justice Department civil attorney to have "free access to a storehouse of evidence compiled by a grand jury," *Id.*, at 431, the Court nevertheless explained that this was insufficient.

The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense. The same argument could be made for access on behalf of any lawyer in another Government agency, or indeed, in private practice. We have consistently rejected the argument that such savings can justify a breach of grand jury secrecy. [*Id.*] (citations omitted).

Most critically, the Court observed:

In most cases, the same evidence that could be obtained from the grand jury will be available through ordinary discovery or other routine avenues of investigation. [*Id.*]

In the case at bar, the Commission has subpoena powers available to it, M.C.R. 9.114(C). The Commission initially spurned use of these powers, preferring instead to rely solely on the grand jury investigation (which found no evidence of wrongdoing to support an indictment).¹³ Its motion for disclosure was filed the day after

¹³ Since there was no indictment and the grand jury's proceedings remain secret, the statement in the Commission's brief that "the Commission learned that the investigations revealed serious violations of ethical rules governing the attorneys' conduct" (Petitioner's Brief, p. 54) has no discernible factual basis.

its investigator filed a request for an investigation. It contained no showing of particularized need. The Commission tells this Court that in the year that has elapsed since its own investigator filed a Request for an Investigation and it sought disclosure, it "has subpoenaed numerous witnesses." (Petitioner's Brief, p. 62) (emphasis in original). These numerous witnesses vitiate the Commission's rationale for grand jury disclosure.

The Commission's disclosure motion stated:

(8) Unless the Commission is granted access to evidence compiled in the course of the Grand Jury investigation relating to attorneys, an injustice will result. The Commission will be unable to investigate charges that certain of this state's attorneys have violated their professional responsibilities as mandated by the Michigan Supreme Court.

This conclusory paragraph was unsupported by facts. According to the Commission's own statements in its brief to this Court, the events of the past year have refuted the threat in paragraph 8. Witnesses have come forward and the investigation has proceeded.

Not only does the Commission fail to show a "particularized need" which is the *sine qua non* for disclosure, but it also fails to justify a fishing expedition into secret grand jury proceedings which found no indictable offense, when its subpoena powers are producing witnesses.

Next, petitioner erroneously asserts that the reasons for grand jury secrecy are no longer applicable because the grand jury proceedings are terminated. In the appellate cases the Commission cited wherein disclosure was permitted after termination of grand jury proceedings, the investigation had resulted in an indictment. See *e.g.*, *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1976) and *In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978). In the latter case, not only had the appellant been indicted and pled *nolo contendere*, but the attorneys seeking disclosure

were Department of Justice attorneys who were entitled to access without a court order. In its cited case from the Eastern District of Pennsylvania, *i.e. In re Grand Jury Proceedings*, 483 F.Supp. 422, 424 (E.D. Pa. 1979), the court refused to disclose federal grand jury proceedings sought by a state assistant attorney general and noted that the "bare assertion that the disclosure is 'in the interest of justice' fails to meet that standard." That standard, according to the Court, was a "compelling, particularized need." *Id.* Further, the Pennsylvania district court explained:

Even when the grand jury has concluded its operations, the Supreme Court still requires the District Court to consider not only the immediate effects upon a particular grand jury but also the possible effect upon the functioning of future grand juries. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). [*Id.*, at 425.]

Conclusion of grand jury proceedings did not justify disclosure in Pennsylvania; it does not justify disclosure in Michigan. Respondent is an "innocent accused who is exonerated from disclosure of the fact that he has been under investigation" and accordingly entitled to protection. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) citing Third Circuit precedent.

Next, petitioner trivializes the necessity to protect respondent's reputation. This is unconscionable. Respondent has an unblemished, enviable reputation established through thirty-five years of distinguished practice. He is entitled to the protection of the law, no less than any other citizen.

Respondent can take no comfort in the purported confidentiality of a Commission investigation under M.C.R. 9.126. Its long-term survival is questionable. In the June 28, 1990 Special Counsel's Summary Report to Supreme

Court in *In the Matter of The Attorney Grievance Commission Investigation*, S.Ct. Admin. Order, November 22, 1989. Special Counsel Theodore Souris recommended, *inter alia*, that M.C.R. 9.126(A) and (D) be "amended to protect only unevaluated allegations from public disclosure and only for the period prior to their dismissal, issuance of admonition or the filing of a formal complaint." *Id.*, at 19. Many amendments to the rules governing attorney grievances have followed with celerity in the fifteen months since the issuance of that report. Subchapter 9.100 of the Michigan Court Rules covers attorney discipline. The following rules have been amended during this time period: M.C.R. 9.105; 9.108 (three changes); 9.109 and 9.114 (effective July 27, 1990); 9.108 (effective September 14, 1990); 9.108; 9.110; 9.112; 9.113; and 9.126 (two changes) (effective February 1, 1991); and another change to M.C.R. 9.110 (effective June 3, 1991). Although the secrecy of an investigation under MCR 9.126, is still intact, possibly because of opposition to the Souris proposal by distinguished members of Michigan bench and bar,¹⁴ the recent pace and extent of rule amendment undermines confidence in its continuing viability.

Next, Commission's statement that "Doe has failed to indicate any specific harm that would result from disclosure of grand jury evidence in this case" (Petitioner's Brief, p. 62) reveals callous insensitivity. The disclosure of the fact of a grand jury investigation is the harm. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (11th Cir. 1987) which the Commission cites, involved disclosure of grand jury materials¹⁵ to the House Judiciary

¹⁴ M. Franck, "Public Disclosure of Innuendo, Unsubstantiated Allegations and other Assaults on Reputation," 70 Mich. B.J. 12, January, 1991; the Honorable Robert B. Webster, President, Michigan State Bar, July 23, 1990 letter disseminated to all Michigan attorneys.

¹⁵ These were the same materials and involved the same federal judge who had been indicted, tried and acquitted, discussed *supra*. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984), *supra*.

Committee which had initiated an impeachment inquiry. The parties agreed, that "a Senate impeachment trial qualifies as a 'judicial proceeding' and that a House impeachment inquiry is 'preliminary to' the Senate trial." *Id.*, at 1440. The only question was whether there was a sufficient showing of particularized need. In that case there was no policy consideration of protecting an "innocent accused who has been exonerated from disclosure of the fact that he has been under investigation. . . ." *Id.*, at 1441, as there had been a public trial. In the case at bar, Doe is entitled to that protection.

The Commission improperly engages in attempted burden-shifting. It has the burden of showing a particularized need pursuant to copious precedent discussed *supra*. Absent that showing, respondent is entitled to rely upon the secrecy of grand jury proceedings and the narrowly drawn exceptions thereto, zealously guarded by the federal appellate courts. We refer to *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983) (cited by petitioner) which affirmed the denial of grand jury material sought in an antitrust action. In the *Abbott* case, the Attorney General of the state of Illinois sought disclosure under the Clayton Act, § 4F(b) as amended, 15 U.S.C. § 15f(b). He requested the release of all grand jury material — as here. This Court quoted the comments of the Chief Judge of the district court, giving them "special weight" in footnote eight, where he explained:

Its wholesale disclosure could be embarrassing, if not destructive of third parties or unindicted individuals and corporations concerned when witnesses are called upon to testify or furnish evidence which involves them. . . . [*Id.*, at 564.]

The request for disclosure was consistently denied. There, as here, the argument was that the burden would be satisfied by facilitating the state's access. We quote from the Court's final paragraph which has applicability here:

Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants. But the rule is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so. The general goals of enhancing federal-state cooperation in antitrust enforcement, and encouraging more state lawsuits against price-fixers, are not sufficient. The statute as enacted by Congress simply does not authorize the Attorney General to turn over the entire investigative record of a federal antitrust grand jury to a state attorney general who has not complied with the judicially developed standards implementing Rule 6(e). Because the disclosure requested by the State in this case is not permitted by Rule 6(e) on the basis of the showing it made to the District Court, the judgment of the Court of Appeals is affirmed. [*Id.*, at 572-573] (footnotes omitted).

Just as the federal antitrust law did not authorize disgorging grand jury proceedings to an attorney general who had not complied with the judicially developed standards implementing Rule 6(e), no assertion of amorphous needs by an administrative agency with subpoena powers can support disclosure.

The Sixth Circuit decision in the case at bar is consistent with myriad appellate decisions which preserve grand jury secrecy from the multitude of petitioners who seek to unveil the proceedings.

The cases demonstrating the need to maintain the secrecy of grand jury testimony against assault by disclosure motions are many and varied. For example, in *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir. 1977), the Fifth Circuit rejected the State's claim that it did not need to show a particularized need in antitrust

litigation. *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963), is another example of appellate court reversal of a disclosure order. See also *Blumenfeld v. United States*, 284 F.2d 46, 50 (8th Cir. 1960), *cert. denied*, 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692 (1961), where this Court referred to the motion as a "fishing expedition," and held that defendant's motion to inspect grand jury minutes was properly denied because there was no clear showing of good cause.

Between the *Procter & Gamble* case, decided in 1958, and the 1983 *Sells Engineering* decision, came *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). In *Douglas*, this Court explained that by preserving the secrecy of grand jury proceedings, it

assures that persons who are accused but exonerated by the grand jury will not be held up to public ridicule. [*Id.*, at 219.]

The *Douglas* Court set forth the standard for determining when the traditional secrecy may be broken as follows:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations, as it had in *Dennis*. . . . [*Id.*, at 222.]

Douglas Oil conforms, of course, with *Sells Engineering*, which further defined the standard as requiring a "strong showing of a particularized need," a showing that the need for disclosure is greater than the need for secrecy, and, finally, a showing that the request is structured to cover only the needed material.

Respondent submits that the trial court failed to recognize that the Commission's disclosure motion was fatally flawed. There was no showing of particularized need; no showing that disclosure must prevail over the need for secrecy; and no well structured request. In short, the Commission's request is a fishing expedition, designed for defeat under the law. The Sixth Circuit recognized the deficiencies in the motion and reversed the district court.

In summary, the Court of Appeals for the Sixth Circuit here rendered a decision which follows the precepts of this Court as expressed in voluminous precedent and is consistent with the decisions of the Courts of Appeals from its sister circuits. The Commission did not satisfy either prong of Rule 6(e)(3)(C)(i). It has no meritorious basis for seeking review.

RELIEF

WHEREFORE, respondent respectfully prays that the Commission's petition for a writ of certiorari be denied.

Respectfully submitted,

LOPATIN, MILLER, FREEDMAN, BLUESTONE,
ERLICH, ROSEN AND BARTNICK

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